HISTORY

OF THE

ENGLISH LAW,

FROM THE

TIME of the SAXONS,

TO THE

END of the REIGN of ELIZABETH.

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VOL. V.

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The Reformation re-established.

THE first object, at the commencement of this queen's reign, was, to establish the reformation upon the foot it was on at the death of Edward the Sixth. For this purpose was made stat. 1 El. c. 1. which began this great work in the manner Henry the Eighth had done, by first abolishing the authority of the Pope. It was thereby enacted, that stat. 1 & 2 P. & M. c. 8. should be repealed; and that the following statutes should stand revived, namely, stat. 23 Hen. 8. c. 9. ordaining that no one should be cited out of the diocese where he dwells. Stat. 24 Hen. 8. c. 12. taking away appeals to the See of Rome. Stat. 25 Hen. 8. c. 19. concerning the submission of the clergy.

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Stat. 25 Hen. 8. c. 20. restraining the payment of first fruits and tenths to the See of Rome, and for electing and consecrating archbishops and bishops. Stat. 25 Hen. 8. c. 21. concerning exactions and impositions heretofore paid to the See of Rome, and concerning licences and dispensations within the realm. Stat. 26 Hen. 8. c. 14. for consecration of suffragans. Stat. 28 Hen. 8. c. 16. declaring void all bulls and dispensations from the Pope.

Besides these which more directly concerned the papal authority; it was also declared, that so much of stat. 32 Hen. 8. c. 38. concerning precontracts and degrees of consanguinity as was not repealed by stat. 2 & 3 Ed. 6. c. 23. and stat. 37 Hen. 8. c. 17. empowering doctors of the civil law, being married, to exercise ecclesiastical jurisdiction; and all parts of it not repealed in the time of Edward the Sixth shall continue in force. And, bating all these acts, every other act repealed by the said stat. 1 & 2 P. & M. c. 8. is to continue repealed. Consistently with the same views the stat. 1 Ed. 6. c. 1. for receiving the sacrament in both kinds was revived. And, lastly, the stat. 1 & 2 P. & M. c. 6. which had revived the stats. 5 Ric. 2. stat. 2. c. 5. stat. 2 Hen. 4. c. 15. and stat. 2 Hen. 5. c. 7. against heresies, was repealed. Thus were all the supports of papal jurisdiction once more removed; and the parliament left at liberty to declare, that no foreign prince, person, prelate, state or potentate, spiritual or temporal, shall use, enjoy, or exercise any manner of power, jurisdiction, superiority, authority, pre-eminence, or privilege, spiritual or ecclesiastical, within this realm, or any of her majesty's dominions; and all such power and authority before exercised and used, was thereby united and annexed to the crown; and the queen was empowered to appoint persons to exercise such jurisdiction and authority.

To secure a full obedience to this new establishment, an oath was devised, in which, the party taking it, declared that the queen was the only supreme governor of this

realm, and of all other her dominions; as well in spiritual things or causes as temporal; that no foreign prince, person, prelate, state, or potentate, had, or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within this realm; that he did utterly renounce all foreign jurisdictions and authorities, and did promise to bear true allegiance to the queen.

This oath was to be taken by every ecclesiastical person, officer, and minister; by every temporal judge, justice, mayor, and other lay, or temporal officer or minister; and every other person having the queen's fee or wages, under no severer penalties than disability to hold such preferments or offices. Persons before they take orders, or a degree, are first required to take the said oath. Heavy penalties are inflicted on those who impugn the supremacy of the crown.

The next step in effecting this reformation was to revive the use of the Common Prayer, and administration of Sacraments, as ordained by Edward the Sixth. This was done by stat. 1 El. c. 2. which repealed stat. 1 Mar. st. 2. c. 2., an act which, the parliament says, "brought great decay of the due honour of God, and discomfort to the professors of the truth of Christ's religion." But this repeal concerned only so much of the said stat. of P. & M. as related to the said book; which book, with the order of service, administration of sacraments, rites, and ceremonies, with the alterations and additions made by this statute, is declared to be in full force and effect. Many penalties are enacted against those who use any other service than this, or who speak any thing in derogation of it; and persons are constrained, by certain pains and censures, to attend at church.

In this manner was the reformation of religion re-established as far as laws could go, and consistently with the general inclinations of the kingdom. But there followed from this revolution much trouble and anxiety. A new set of malcontents sprung up under the name of noncon-

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formists, which kept the government in alarm; these were at first the Roman Catholics, and afterwards the Puritans; who were considered as equal enemies to the established church, and were the objects of many penal restrictions in the course of this reign.

The next act made upon the subject of these new ecclesiastical alterations was stat. 1 El. c. 4. which repealed stat. 2 & 3 P. & M. c. 4., and thereby re-annexed to the crown, the payment of first fruits and tenths. But all statutes before that made for the ordering and levying those dues, (except only the acts for the erection of the court of augmentations, and first fruits and tenths,) were to remain in force. It is further declared, that vicarages not exceeding 10*l. per annum*, and parsonages not exceeding ten marks in the king's books, shall be discharged of first fruits. That incumbents who happen to live only one-half year, shall pay only one-fourth of the first fruits due; those who live one year, only half; if a year and a half, three parts; and shall not be chargeable for the whole first fruits till they have enjoyed their preferment two years.

Simony.

To prevent occasions of scandal in the ministry of the reformed church, it was thought proper to put some restraint on simoniacal practices; which had hitherto been punishable only in the ecclesiastical court, by virtue of certain canons. It is therefore enacted by stat. 31 El. c. 6. that if any person shall by money, or agreement for money, give or procure to be given any ecclesiastical preferment, these consequences shall follow; such gift shall be void; the presentation for that time shall be forfeited to the king; the person corruptly presenting shall forfeit double the yearly value of the living; and the person presented disabled to take the benefice. A penalty is also inflicted on persons consenting for money to institute or admit any one to a living; such person is to forfeit double the yearly value of the living; the institution or admission to be void, and the patron allowed again to present. To

prevent the like corrupt contracts concerning exchanges of livings, double the sum given to procure such changes is to be forfeited both by the giver and taker.

To suppress simony in its first concoction, it is moreover provided, that the giving or procuring holy orders to be given for money, or for any agreement for money, shall induce the penalty of 40*l.*, and the party so corruptly ordained shall forfeit 10*l.* Besides which, should he afterwards within seven years take a living, it shall immediately become void, and the patron be enabled to present afresh. All these temporal penalties are enacted, without any prejudice to the jurisdiction of the spiritual court; with regard to which, this act can only be considered as accumulative; by bringing before the temporal magistrate some more flagrant acts of simony.

The Statute of Labourers.

Some very material regulations were made in this reign by parliament concerning the poor and labouring part of the nation. This great bulk of people were considered by the law in three lights; such who, by their education and living, were fit and habituated to work and labour, and such who were poor. These latter were of two descriptions; the one was such as lived in beggary, through wilful idleness, and were therefore looked upon, in a great degree, as offenders; the other was such as were sick and impotent, and unable to provide for themselves. Under these three considerations were statutes now made, composing a body of provisions for the ordering and correction of such persons; namely, stat. 5 El. c. 4. concerning *labourers, artificers, and apprentices.* Stat. 39 El. c. 4. concerning *rogues, vagabonds, and sturdy beggars;* and statute 43 El. c. 2. *for the relief of the poor.*

These statutes make very full provisions for such matters as were the objects of them; and, as they were framed upon thorough consideration, and the experience of ages, that part of the community to whom they related were governed by them for many years without much alteration. The particular regulations of these statutes, had either been

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adopted from preceding ones on the same subject, or had been suggested by the defects and evil consequences attending former laws. The former statutes relating to the poor were many; a retrospective view of them will at once discover the different ways in which this matter had been treated, and the degrees by which these regulations grew to their present size. To begin with artificers and labourers.

The Statute of Labourers.

The first regulation concerning them is the statute of labourers, 23 Ed. 3. This act is said to have been occasioned by the late pestilence, which had carried off many working people. Servants and labourers, seeing the difficulty masters were under from the scarcity of hands, would not serve without excessive wages; and many refusing to work took to begging and disorderly courses. It was therefore thought advisable, that some compulsory method should be prescribed; and it was accordingly enacted, that every man and woman, able in body, and within the age of threescore, not living in merchandize, nor exercising any craft, not having of his own whereof to live, nor land about whose tillage he might employ himself, nor serving any other, such person should be bound to serve, if required, at the accustomed wages; and if he refused, was to be committed to the next gaol, till he found surety to be entered into service, c. 1. If any workman or servant departed before the term agreed, he was to be imprisoned, c. 2. None were to pay more than the old wages, upon pain of forfeiting double what they so gave, c. 3.; and if any took more, he was to be committed to gaol, c. 5.; and such overplus wages was to be levied to the king's use, in alleviation of the dismes and quinzimes, assessed on the town or district, c. 8. Upon this statute many commissions were granted to make inquiry concerning the execution of it.

But this statute not answering the end effectually, was followed by stat. 25 Ed. 3. st. 1. which contained many further provisions; amongst others, carters, ploughmen, and other servants were to serve by the whole year, or by other usual terms, and not by the day, c. 1. None was to go

out of the town where he dwelt in winter to serve in summer, if he could get work therein, c. 2. The wages of certain artificers, and of servants in husbandry were fixed by this act, c. 2, 3. And, to make sure of fair dealings, cordwainers and shoemakers were to sell at the price in 20 Ed. 3. And saddlers, horsemiths, taylors, and all other servants not mentioned in the act, were to be sworn before the justices, to do and use their crafts and offices in the manner they were wont to do in 20 Ed. 3.; and any breaking this statute, after such oath, was to be punished by fine and imprisonment, at discretion of the justices. If labourers or artificers left their work, and went into another county, process was to issue to the sheriff; and if he returned *non inventus*, there was to be an exigent at the first day, by stat. 34 Ed. 3. c. 10.

By stat. 12 Rich. 2. c. 3. no servant or labourer, whether man or woman, was to depart at the end of his term out of the hundred where he dwelt, to serve elsewhere, unless he brought a letter patent (namely, a testimonial) containing the cause of his going, and time of his return, if he was to return, under the king's seal, which for this purpose was to be in the keeping of some good man of the hundred; and a servant wandering without such testimonial, was to be put in the stocks till he gave surety to return to his service. And he or she who used to labour at the plough and cart, or other service of husbandry, till twelve years of age, should so abide, and not be put to any other mistery, c. 5. By stat. 13 Ric. 2. st. 1. c. 8. the justices were to settle, and make known by proclamation, between Easter and Michaelmas, what should be the wages of day-labourers.

Because many persons of country towns and villages bound their children apprentices to trades in cities and boroughs, "for the pride (says the statute) of clothing, and other evil customs, which servants do use in the same," so that there was a scarcity of labourers in husbandry: it was enacted by stat. 7 Hen. 4. c. 17. in affirmance of stat.

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12 Rich. 2. above mentioned, that no person should put a son or daughter apprentice within a city or borough, except he had land, or rent to the value of 20*s.* *per annum* at least, upon pain of a year's imprisonment. And every person offering to apprentice a child in a city or borough was obliged to bring a bill, sealed by two justices of the county, testifying the value of his land or rent.

By stat. 23 Hen. 6. c. 13. a servant having agreed to serve another person next year, was directed, together with such other person, to give warning to his master, at the midst of the term, or before. After this, there is no other statute on this subject, till stat. 3 & 4 Ed. 6. c. 22. where it was ordained that cloth-makers, fullers, sheermen, taylors, and shoe-makers should not retain journeymen for less than a quarter of a year. And every one in these trades having three apprentices was to have one journeyman.

These are the principal parts of some of the many acts that had been made, and were now in force, concerning the returning, the departure, the wages, of servants, labourers, and apprentices. They had been accumulating from the time of Edward the Third, and had now, partly from their imperfection, partly from their contrariety, as well as from their number, and the alteration of circumstances, become almost impossible to be executed without oppression, or inconvenience. However, as they had all of them been beneficial at the time they were passed, it was thought that such of the substance of them as was adapted to the present times should be reduced into one statute, which should comprise some uniform regulations upon this subject. Accordingly, all former laws are repealed by stat. 5 El. c. 4. and by the same act, a set of rules are digested for ordering these matters, which have undergone very little mutation since, and are all now in force.

The following are the provisions made by this act: —

No one shall be retained for less than a year, in certain trades therein mentioned, and every person, unmarried, and every married person under thirty years of age, brought

up in the said trades, or having exercised them for three years, not having lands freehold, or copyhold, for term of life at least, of clear 40*s. per annum*, nor goods to the value of 10*l.*, and so allowed by two justices of the peace, or the mayor, or head officer of the place where he last dwelt for a year, nor being retained already in husbandry, or the above trades, nor in any other; nor in service of any nobleman, gentleman, or other; nor having a farm whereon to employ himself in tillage; such person *shall serve* in the trade he has been brought up in, if required.

No person shall put away such servant, nor shall the servant depart, before the end of his term, unless for reasonable cause to be allowed before two justices, or before the mayor or other chief officer of the place; nor shall the servant depart without a quarter's warning, given either by the master or servant. Thus far of persons *compellable to serve in certain trades.*

Next as to *husbandry.* Every person from twelve to sixty, not being a servant lawfully retained, nor apprentice to any fisherman, or mariner, nor in service with any carrier of grain to London, nor with any husbandman, nor in any city, town corporate or market town, in any trade authorized by this statute to take apprentices, nor retained yearly or half yearly, at least, in working mines of silver, lead, tin, iron, copper, stone sea-coal, stone coal, moor coal, or charcoal; nor in making glass, nor being a gentleman born, nor student in the universities, or in any school; nor having an estate for life, at least, in lands of 40*s. per annum*, nor goods to the value of 10*l.*; nor having a father or mother then living, or other ancestor, whose heir apparent he is, then having lands of 10*l. per annum*, or goods of the value of 40*l.*; nor being a necessary and convenient servant lawfully retained, as before mentioned; nor having a farm whereon to employ himself, nor otherwise lawfully retained according to this statute; such person, being between twelve and sixty years old, shall be compelled to serve in husbandry by the year, if required.

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To enforce all which provisions, it is declared, that persons so qualified, who refuse to serve, or depart before the end of their term, and without a quarter's warning (unless for reasonable cause as before mentioned), may be examined by two justices, or the mayor, or other chief officer of the place; and, upon its being proved, shall be committed to ward, without bail or mainprize, until he be bound to serve the party making the complaint. And a master putting his servant away before his term ended, without a quarter's warning, is to forfeit, in the same manner, forty shillings.

No servant retained in the above trades and husbandry shall, after his term, depart from one city, town, parish, hundred, or county, to another, unless he have a testimonial under the seal of the said town, or of the constable and of two other honest householders of the place where he last served, declaring his lawful departure. Nor shall he be again retained without showing such testimonial to the chief officer of a town corporate, and, in other places, to the constable, curate, churchwardens, where he is to be retained. Servants departing without such testimonial are to be imprisoned till they procure one; which they are to do within twenty-one days, or are to be treated and whipped as vagabonds. And persons retaining a servant without such testimonial are to forfeit *5l.* Thus far *of yearly servants* in husbandry and the trades above mentioned.

Respecting *artificers and labourers*, being *hired* for wages *by the day or week*, certain orders are made about their times of work and rest; and as to those employed in building or repairing who take upon them to finish any work, they are not to depart, unless for not paying their wages, or by their master's licence, before finishing, under pain of a month's imprisonment and forfeiture of *5l.*

As to the wages, whether of servants, labourers, or artificers, either working by the year, day, or otherwise, they are to be settled by the justices yearly at the Easter Sessions, to be certified, on parchment, to the chancellor, from whence it is to be sent, before the first of September, and to

be proclaimed on market day, and fixed up in some open place. Persons giving more wages than allowed by the proclamation, are to be imprisoned ten days; and those taking more, twenty-one days.

A servant assaulting his master is to be imprisoned for a year, or less, by the discretion of two justices. The justices, and also the constable, upon request, may compel such artificers and persons as be meet for labour, to serve in harvest of hay, or corn, in mowing and reaping; and if any refuse, he is to be put in the stocks for two days and one night.

The next provision of this act regards *women*, who, between twelve and forty years of age, unmarried and out of service, may be appointed by two justices to serve by the year, week, or day, for such wages, and in such reasonable sort and manner as they shall think meet; and upon a woman's refusal so to serve, she is to be committed to ward till she consents.

The next description of servants who are regulated by this act are *apprentices*. For the advancement of husbandry, it is declared, that any householder having and using half a ploughland, may have as an apprentice a person above ten and under eighteen years, until twenty-one years at least, or twenty-four. The said retainer to be by indenture.

And every householder, being twenty-four years of age, living in a city or town corporate, and exercising any art or mystery, may have the son of any freeman, not occupying husbandry, nor being a labourer, and living in that or some other city or town corporate, as an apprentice, after the custom of London, for seven years at least, so as the term do not expire before the apprentice shall be at least of twenty-four years.

As to merchants, mercers, drapers, goldsmiths, ironmongers, embroiderers, clothiers, living in a city or town corporate, these being occupations of a higher order, they are not to take any apprentice, except their own sons, or

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else the father and mother of such apprentice shall have lands of 40*s. per annum* of an estate of freehold, at least, to be certified under the hands of three justices.

But in towns not corporate, so long as a market be weekly used there and kept, any householder of twenty-four years old, not occupying husbandry, nor being a labourer, exercising any art or mystery, may have to apprentice the child of any other artificer, not occupying husbandry, nor being a labourer, dwelling in the same or in any other market town. However, this is not to be construed to give permission to merchants, mercers, and those just mentioned, to take apprentices, in market towns, otherwise than as before directed.

And the son of any person, though his father has no lands, may be put apprentice to a smith, wheel-wright, plough-wright, mill-wright, carpenter, rough-mason, plaisterer, and several others mentioned in the act, of the like class.

And to encourage this kind of service, it is enacted, that no one shall exercise any craft, mystery, or occupation, *then used*, or occupied within the realm of England or Wales, except he shall have been brought up therein seven years at least as an apprentice in manner and form above mentioned, upon pain of forfeiting forty shillings for every month he shall so do.

None shall be apprentice to a woollen cloth weaver, unless his own son, or the son of one who has land of 3*l. per annum* of freehold estate at least, signified by the seals of three justices; and the effect of the indenture is to be registered within three months in the parish where the master dwells, upon pain of forty shillings for every month that a person shall take an apprentice otherwise. (Repealed by stat. 5 & 6 W. & M. c. 9.)

Every cloth-maker, fuller, sheerman, weaver, taylor, or shoemaker, having three apprentices, shall have one journeyman; and for every apprentice above three, one journeyman.

Any person required by a householder, having and using a ploughland at least in tillage, to become an apprentice, in husbandry, or any other occupation, and if he should refuse, may, upon complaint to a justice, or the mayor, or chief officer of the place, be sent for; and if it appears that he is a proper person, he shall be committed to ward till he consents. And where such master or apprentice have cause of complaint against each other, they shall repair to a justice, or mayor, or chief officer, who shall determine it; and if the master will not agree, and compound the matter, he shall be bound in a bond to appear at the next sessions for the county, city, town corporate, or market town; when, upon hearing the matter, the justices, or four of them at the least, or the mayor, or other head officer, with the assent of three other of his brethren, or men of best reputation within the said city, town corporate, or market town, if they think meet to discharge the apprentice, shall have power, in writing under their hands and seals, to pronounce and declare that they have discharged the said apprentice of his apprenticehood, and the cause thereof. But if the default shall be found in the apprentice, then the justices, or mayor, or chief officer, with the assistance aforesaid, may cause due correction and punishment to be administered to him.

None but those under twenty-one years are to be bound apprentice; and all indentures, covenants, and bargains for taking or keeping an apprentice, otherwise than is limited by this statute, is void; and every person so retaining an apprentice shall forfeit 10*l.* And to remove a doubt whether such indenture, executed by an apprentice under age, was good any where but in the city of London, they are declared legal and valid.

This is the substance of this statute; which though wholly in force, and parts of it completely observed at this day, is in many of its directions entirely disregarded. The alterations of times, which rendered the old statutes of labourers useless and inconvenient, have brought this a

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good deal into the same predicament; many of the requisites of this act become unnecessary and absurd in the present state of things, which no doubt at the time were founded in good policy.

Of Vagrants.

We shall next consider the stat. 39 Eliz. c. 4. concerning *vagabonds*; but before that we shall pursue the method observed in the subject we have just dismissed, and take a cursory view of former laws concerning vagabonds and rogues.

There is a chapter in the statute of labourers 23 Ed. 3., that may be considered as the first law against vagabonds. It is there said (c. 7.) that "because many valiant beggars, as long as they can live of begging, refuse to work, giving themselves to idleness, and vice, and sometimes to theft, and other abominations;" it should be enacted, that none, under pain of imprisonment, should give any thing to such, which may labour, so that they may thereby be compelled to labour for their living. By statute 12 Rich. 2. c. 7. every person that goeth begging, and is able to serve or labour, shall be treated as one that goeth out of the hundred without a testimonial, which punishment has been mentioned where we spoke of labourers. After these there was no statute on this subject till 11 Hen. 7. c. 2., when it was directed that vagabonds, idle and suspected persons, should be set in the stocks three days and three nights, be sustained only on bread and water, and then put out of the town; with a forfeiture of one shilling on those who give them more. Vagabonds were punished by stat. 19 Hen. 7. c. 12. By stat. 22 Hen. 8. c. 12. a vagabond taken begging was to be whipped, and then sworn to return to the place where he was born or last dwelt, by the space of three years, and there to put himself to labour. Again, by stat. 27 Hen. 8. c. 25. all governors of shires, cities, towns, hundreds, hamlets, and parishes, were to compel every sturdy vagabond to be kept in continual labour. And further, a valiant beggar, or sturdy vagabond, was at the first time to be whipped, and sent to the place where he was born, or last dwelt, by the

space of three years, there to get his living: and if he continued his roguish life, he was to have the upper part of the gristle of his right ear cut off; and if after that he was taken wandering in idleness, or did not apply to his labour, or was not in service with any body, he was to be adjudged and executed as a felon.

The next statute was, perhaps, still more severe: this was stat. 1 Ed. 6. c. 3., which repealed all former laws of this kind; and reciting, that the multitude of people given to idleness and vagabondry was more in number (as it may appear) in this realm than in any other region, enacted such severe punishments for this offence, as, it was thought, would surely suppress it in future. By this act any runagate servant, or any other that lived idly and loiteringly, by the space of three days, being brought before two justices, was to be marked with a hot iron on the breast, with the mark of V., and should be adjudged a slave for two years to the person who brought him, to be fed on bread, water, and small drink, and refuse meat; and to be made work by beating, chaining, or otherwise, be the work or labour never so vile. If such slave absented himself for fourteen days during that term, he was to be marked on the forehead or ball of the cheek with a hot iron, with the sign of an S., and further to be adjudged a slave for ever; and if he run away a second time, to be adjudged a felon.

But as much of this statute as made vagabonds slaves was soon repealed by stat. 3 & 4 Ed. 6. c. 16., and stat. 22 Hen. 8. c. 12. was revived, all others still continuing repealed. It was moreover provided, that labourers in husbandry that were idle and loitered when reasonable wages were offered them, should be punished as vagabonds: which stat. 22 Hen. 8. c. 12. and 3 & 4 Ed. 6. c. 16. were confirmed by stat. 5 & 6 Ed. 6. c. 2., and afterwards by stat. 5 El. c. 3.

But all these three first statutes were repealed by stat. 14 El. c. 5.; and by the same act it was ordained, that a vagabond above the age of fourteen should be adjudged to

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be grievously whipped and burnt through the gristle of the right ear, with a hot iron of the compass of an inch, unless some creditable person would take him into his service for a year. And if being of the age of eighteen, he did after fall into a roguish life, he was to suffer death as a felon, unless some creditable person would take him into his service for two years. By stat. 18 El. c. 3. a rogue was to be conveyed from constable to constable, till he came to the gaol. Which two statutes were repealed by stat. 35 El. c. 5. s. 24., after which there was no act in force against these offenders till stat. 39 El. c. 4. was made. This act repeals all statutes concerning punishment of vagabonds, and the erection and maintenance of houses of correction, and enacts, that the justices in quarter sessions shall set down order for erecting one or more houses of correction within their county or city; who are also to make orders for raising money to build and maintain such houses, and for governing the same, and punishing offenders committed thither.

Respecting the description and character of persons who are to be considered as the objects of this act; they are thus set forth by this statute: All persons calling themselves scholars, going about begging; all sea-faring men, pretending losses of their ships, or goods on the sea, going about begging; all idle persons going about the country, either begging or using any subtil craft, or unlawful games and plays, or feigning themselves to have knowledge in physiognomy, palmistry, or other like crafty science, or pretending that they can tell destinies, fortunes, or such other fantastical imaginations; all persons that are or utter themselves to be proctors, procurers, patent-gatherers, or collectors for gaols, prisons, or hospitals; all fencers, bearwards, common players of interludes and minstrels, wandering abroad, other than players of interludes belonging to any baron of the realm, or any other honourable personage of greater degree, to be authorized to play under the hand and seal of arms of such baron or per-

sonage; all jugglers, tinkers, pedlers, and petty chapmen wandering abroad; all wandering persons and common labourers, being persons able in body, using loitering, and refusing to work for such reasonable wages as are taxed or commonly given, not having whereof otherwise to maintain themselves; all persons delivered out of gaol, who beg for their fees, or otherwise travel begging; all persons who shall wander abroad begging, pretending losses by fire or otherwise; and all such persons not being felons (i. e. according to a late act, 5 El. c. 20.) wandering and pretending themselves to be Egyptians, or wandering in the habit, form, or attire of counterfeiting Egyptians; all the above-mentioned persons are to be deemed rogues, vagabonds, and sturdy beggars.

Any such person taken vagrant shall, by the appointment of any justice, constable, headborough, or tythingman (the tythingman or headborough being assisted therein with the advice of the minister and another of the parish), be stripped naked from the middle upwards, and be openly whipped till he is bloody, and shall then be sent from parish to parish by the officers of the same, till he come to the parish where he was born: if that is not known, to the parish where he dwelt for a year last before his punishment; and if that is not known, to that parish where he last passed without punishment. He is to have a testimonial of the day and place of his punishment, and of the place whereunto he is to go; and by what time he is limited to pass thither; and in whatever place he shall be found loitering and making default he shall be whipped, and so on, till he repairs to the appointed place. And the vagrant so whipped, and neither the place of his birth or abode for a year being known, shall, by the officers of the village where he last past through without punishment, be conveyed to the house of correction, or to the common gaol of the county or place; there to be employed in work till placed in some service, and so to continue for a year.

If any of such rogues shall appear to be dangerous to the

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inferior sort of people, or not likely to be reformed, two justices may commit him to the house of correction or gaol till next quarter sessions, and then, if thought fit, he may by the justices there be banished out of the realm, to such place as shall be appointed by the privy council, or by six or more of them, whereof the chancellor or lord treasurer to be one; or otherwise perpetually to the gallies of this realm. And any banished rogue returning, shall be deemed a felon. There are penalties on the constable and tythingman neglecting their duty, on those who obstruct the execution of the act, and on those who bring in by sea any vagrants from Ireland, Scotland, and the Isle of Man.

There are two sorts of travellers excepted, who might otherwise come within the penalties of this act; the first are persons diseased and poor, going to the baths of Buxton and Bath, being licensed by two justices of the place where they dwelt. These persons, having wherewith to provide themselves, and not begging, are protected in going, returning, and their residence there; if they observe the limits of time and place prescribed by the licence.

The other are seafaring men suffering shipwreck, and not having wherewith to relieve themselves in their travelling homeward. Such a person, having a testimonial from one justice of or near the place where he landed, testifying the place whence he came, the place of his birth, whither he goes, and limiting the time for his passing, may ask and receive relief, so long as he goes directly on, and observes the time fixed in his testimonial. This act continued in force for some years (altered by 1 Jac. c. 7. and 25.), and when repealed (repealed by 12 Ann. st. 2. c. 23.) served as a foundation and model for future acts.

Of the poor.

The next consideration regards such *poor* persons as do not come within the above character; but are *impotent*, and unable to maintain themselves. The number of poor, of the former description, as well as of this, had very visibly increased, or, at least, the burthen of them had been more felt, since the dissolution of the religious houses.

These, from the nature of their institution, were under an obligation to make *some* provision for the poor, and they were particularly bound to this duty, in virtue of the revenues they derived from impropriations. In the early times of our ecclesiastical establishment, the bishop used to allot a certain portion of tithes for the maintenance of the poor; and in later times the incumbent of a parish church was to assign a third of his annual income for maintenance of the poor, and support of hospitality, (Ken. Imp. 14, 15.) This was secured by a legislative sanction: for stat. 12 Ric. 2. c. 6. requires, that, in every licence of impropriation of any parish church to be made in the chancery, it should be expressed, that the diocesan shall ordain according to the value of such church a convenient sum of money to be paid and distributed yearly of the fruits and profits thereof to the poor. This relief seems to have been designed for poor in general, without any distinction in the objects.

However, this was not all the reliance the poor had for support; occasional provisions were made by the legislature for this purpose, which, however, afforded relief only to such as more particularly stood in need of it, the impotent and sick. A view of the statutes made on this head will show as well the progress made towards a compulsory method of raising a regular maintenance, as the local title by which poor persons might claim this support, which has since been called *a settlement.*

The first of these statutes is 12 Ric. 2. c. 7., which ordained, that beggars impotent to serve should abide in the cities and towns where they were dwelling at the time of the proclamation of that statute; and if the people of such places would not, or could not maintain them, then they were to go to other towns within the hundred, or to the towns where they were born, within forty days after the proclamation made, and there to abide during their lives. By stat. 11 Hen. 7. c. 2. every beggar not able to work was to resort to the hundred where he last dwelt, is best

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known, or was born, and there remain, upon pain of being put in the stocks three days and three nights, fed on bread and water, and put out of the town as a vagabond. Next follows stat. 19 Hen. 7. c. 12. and stat. 22 Hen. 8. c. 12. By the former the poor were restrained from begging at large, and were confined to beg within certain districts. By the latter, the several hundreds, towns corporate, parishes, hamlets, or other like divisions, were required to sustain the impotent poor with such charitable and voluntary alms as that none of them might be compelled of necessity to go openly in begging. By stat. 27 Hen. 8. c. 25. the churchwardens, or other substantial inhabitants, were to make collections for them with boxes, on Sundays and otherwise, by their discretions; and the minister was to take all opportunities to exhort and stir up the people to be liberal and bountiful.

Next to these is stat. 1 Ed. 6. c. 3., which directed that houses should be provided for the poor by the devotion of good people, and materials be provided to set them on such work as they were able to perform; and the ministers of the gospel, every Sunday, were specially to exhort the parishioners to a liberal contribution. Again, by stat. 5 & 6 Ed. 6. c. 2., the collectors for the poor on a certain Sunday, immediately after divine service, were to take down in writing what every person was willing to give weekly for the ensuing year. And if any should be obstinate and refuse to give, the minister was gently to exhort him. If still he refused, the minister was to certify such refusal to the bishop of the diocese, and the bishop was to exhort him in the same manner; and if he still stood out, the bishop was to certify the same to the justices in sessions, and bind him over to appear there.

At length stat. 5 El. c. 3. ordained that the poor and impotent persons of every parish should be relieved of that which every one of their charity would give weekly; and the same relief was to be gathered in every parish by collectors assigned, and weekly distributed to the poor,

for none of them were openly to go or sit begging. And if any parishioner should obstinately refuse to pay reasonably towards the relief of the poor, or discourage others, then the justices of peace at the quarter sessions might tax him to a reasonable weekly sum, which, if he refused to pay, they might commit him to prison. And if any parish had in it more impotent poor persons than they were able to relieve, the justices might license as many of them as they thought proper to beg in one or more hundreds of the same county. And poor persons begging in any other place than where they were licensed were to be punished as vagabonds. This led to the taxation of every parishioner by stat. 14 El. c. 5. Then came stat. 18 El. c. 3. which directs a stock to be provided to set the poor on work in every city and town corporate; for which purpose, and maintaining house of correction, lands in socage may be given for twenty years. This led to the more complete establishment made by stat. 39 El. c. 3., which last act was suffered to expire, and leave room for the legislature to renew its endeavours to put the relief of the poor upon a permanent foundation in some new law. This they did in stat. 43 El. c. 2. which was an improvement and enlargement of stat. 39 El. c. 3., this temporary statute may therefore be passed over without any remark upon it, while we examine the contents of the stat. 43 El. c. 2. which has been in force ever since.

This act directs that the churchwardens, and four, three, or two substantial householders, as shall be thought meet, according to the size of the parish, to be nominated yearly in Easter week, or within one month after Easter, under the hand and seal of two or more justices dwelling in or near the parish, shall be overseers of the poor of the parish. And they, or the greater part of them, shall take order from time to time, with the consent of two or more justices, for setting to work the children of all such parents, who shall not be thought by the said churchwardens and overseers, or the greater part of them, able to keep and maintain them;

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and also for setting to work all persons married or unmarried, having no means to maintain them, and using no trade of life to get their living. For which end they are to raise weekly, or otherwise, (by taxation of every inhatant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, propriation of tithes, coal-mines, or saleable underwood in the parish, in such competent sum as they shall think fit,) a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff, to set the poor on work; and also competent sums of money towards the necessary relief of the lame, impotent, old, blind, and such other among them being poor and not able to work; and also for putting out of such children apprentice, to be gathered out of the same parish, according to its ability, and to execute and dispose every thing respecting the said stock and poor.

These churchwardens and overseers are to meet at least once a month in the parish church on Sunday afternoon, after divine service, there to consult what course or order they are to make respecting the discharge of this trust. They are, within four days after the end of the year, and after other overseers appointed, to make to such two justices a true account of all sums raised, expended, and in hand, and also of the stock, and deliver what is in hand to the new overseers.

If the two justices perceive that the inhabitants of any parish are not able to levy among themselves sufficient sums of money, they may tax, rate, and assess any other of other parishes, or out of any parish within the same hundred as they think fit. If they think the hundred not able, then the justices in quarter sessions shall rate and assess any other of other parishes, or out of any parish within the county.

The overseers are to levy all such sums assessed by distress and sale of the offender's goods, under warrant from two justices, if any refuse to contribute; and in default of distress, two justices may commit him to the county gaol

until payment: as they may such who refuse to work; and the overseers who refuse to account. The overseers may, by the assent of two justices, bind such children as above-mentioned to be apprentices: till twenty-four years of age, if a man child; and if a woman till twenty-one, or marriage. The overseers, under an order of quarter sessions, may agree for building convenient houses on wastes or commons at the expense of the parish, hundred, or county.

To prevent parishes being burthened with unnecessary charges of the poor, it is provided, that the father and grandfather, mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person, not able to work, being of sufficient ability, shall relieve and maintain, at their own charges, every such poor person, according to the rate at which he shall be assessed by the justices of the county where he lives.

These are the principal provisions of this famous statute, for the relief of the poor; which is not only still in force, but in daily use, being that upon which every parochial establishment for this purpose is founded.

Hospitals.

While these schemes were forming for the relief of the poor in general, some charitable institutions were countenanced by the legislature; which, though more partial and confined in their views, contributed to promote the end at that time so much desired. Of this kind were Christ's, St. Bartholomew's, St. Thomas's, and Bridewell Hospitals, founded by Edward VI. To show favour to donations for such benevolent purposes as these, it was enacted by stat. 14 El. c. 14. that all gifts by will or otherwise to hospitals then in being shall be good, notwithstanding any misnaming of the corporation. With the same design was made stat. 18 El. c. 3., which allowed lands holden in socage to be given during twenty years for the maintenance of houses of correction, and stocks for the poor. But this law not having all the good effect expected from it, principally because the charges of incorporation lay heavy upon the founders, and swallowed up much of the in-

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tended donation, it was therefore enacted by stat. 39 El. c. 5. that all persons seised in fee-simple should have power during the twenty years next ensuing, by deed inrolled in the court of chancery, to erect, found, and establish any hospitals, maisons de Dieu, abiding places, or houses of correction, at his will and pleasure, as well for the relief of the maimed, poor, needy, or impotent, as to set the poor to work. And that such hospitals or houses should be incorporated, and have succession for ever of such head, members, and number of people, as should be appointed by the founder in such deed inrolled; and should take, hold, and enjoy lands and tenements, goods and chattels, so that the same exceeded not 200*l. per annum*, notwithstanding the statute of mortmain. To be visited by such as the founder should appoint. And to prevent the dilapidation of such foundations, the like caution was taken as had before been respecting the leases of ecclesiastical persons and colleges. It was enacted, that any conveyance made by such incorporated hospital exceeding twenty-one years, and that not in possession, and whereon the accustomed yearly rent or more, by the greater part of twenty years next before the lease made, was not reserved, should be void. This licence for twenty years was, by a statute made in the next reign, extended to perpetuity. (stat. 21 Jac. c. 1.)

Statute of charitable uses.

These statutes, made for the benefit of the needy and impotent, were very properly followed by one passed in the last year of this reign: this is *the statute of Charitable Uses*, as it is called; the design of which was to guard such and the like institutions from fraud and negligence, and make order for fulfilling their original intention of them. It recites, that whereas lands, hereditaments, goods, and money have been given by many well-disposed persons; some for relief of aged, impotent, and poor people; some for maintenance of sick and maimed soldiers and mariners, schools of learning, free-schools, and scholars in universities; some for repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; some for education and preferment of orphans;

some for or towards relief, stock, or maintenance for houses of correction; some for marriages of poor maids; some for supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; and others for redemption and relief of prisoners or captives, and for aid or ease of any poor inhabitants, concerning payments of fifteenths, setting out of soldiers, and other taxes; which donations had not been employed according to the design of the founders, by reason of breaches of trusts and omissions of those who should pay, deliver, or employ them; for remedy whereof it is thereby enacted, that the chancellor (and the chancellor of the Duchy of Lancaster within his jurisdiction) may from time to time award commissions under the great seal to the bishop of every diocese (and to the chancellor, if no bishop at the time), and to other persons of good and sound behaviour, authorising them, or any four of them, to enquire, as well by the oaths of twelve lawful men or more of the county, and by all other good and lawful means, of all such gifts and appointments; and of abuses, breaches of trusts, misemployments, concealing, or misgovernment of lands, hereditaments, goods and money, appointed for any of the charitable and godly uses before mentioned. And the commissioners, after enquiry, shall make orders, judgment, and decrees for faithfully employing such gifts to the charitable uses and intents for which they were appointed; with an appeal therefrom to the chancellor.

This act is not to extend to the two universities; nor to the colleges of Westminster, Eton, or Winchester; nor to any cathedral or collegiate church; nor to any city or town corporate; nor to any lands given to such uses within a town corporate or city, where there is a special governor appointed to direct and dispose such lands and gifts; nor to any college, hospital, or free-school, which have special visitors, governors, or overseers appointed by the founder; nor be prejudicial to the jurisdiction of the ordinary.

These are the provisions made by this famous statute; which, upon the face of it, appears nothing more than an

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ordinance prescribing a mode of visiting and correcting the government of public charities, under a commission from the great seal. However, the anxiety hereby shown to protect and encourage such benevolent establishments, was, in after-times, made use of to deduce consequences not intended or foreseen by the makers of the act. It has been held, that gifts to corporations and bequests of estates-tail, without a recovery, are made valid by this statute, under the idea of appointments to charitable uses. 2 Atk. 552, 553. Duke's Cha. Uses, 84.

Of Church Leases.

While the parliament were consulting for the encouragement and due order of these institutions, it passed several acts for the preservation of another kind of public property, the possessions of the church: these had of late suffered considerable dilapidations. The revenues of bishoprics had always lain at the mercy of the crown; which, on the restitution of the temporalties, would reserve to itself out of them what it thought convenient or proper. To give an instance of the little scruple with which this was done, Henry 8., upon the judgment of *præmunire* against Cardinal Wolsey, then archbishop of York, seized York-house, the town-residence of that see, and ever after it remained in the crown; the bishop who succeeded having a right to no more than he was put in possession of, on the restitution of the temporalties. When the Reformation had begun, this practice of plundering the possessions of bishops became more common, owing to the delinquency many incurred by non-conforming with the new establishment, and the colour thereby furnished of seizing the whole or part under the notion of forfeiture.

This was one way in which the church was plundered; but this was involuntary. There was another practised by the churchmen themselves, which had very much increased of late, from the circumstances of the times. The clergy in queen Mary's time, particularly the bishops, foreseeing a protestant succession would soon take place, were resolved to make the most of their present possession; and exercised

the full extent of that power over their ecclesiastical property which was allowed them by the law, in letting long leases, and otherwise incumbering it; little solicitous how much they dilapidated the revenues of their successors. Bishop Gardiner made no scruple of boasting of this practice, and used to say, in allusion to the length of his leases, that he should be a bishop a hundred years after he was dead. Abuse like this called for some remedy; and accordingly several provisions were made by parliament, which have since been known by the appellation of *the restraining statutes.*

These we shall mention in the order in which they were made. The first is stat. 1 El. c. 19., and relates only to bishops. This act having enabled the crown (which power was heretofore exercised by the king without such a parliamentary sanction), upon the vacancy of any archbishopric or bishopric, to take into its possession as much of its lands as amounts to the value of the parsonages appropriate, and tenths within the same, belonging to the crown, so that an exchange shall in that manner be effected; in order that the said revenue of tenths and impropriate benefices might be in the governance and disposition of the clergy; having made this regulation, the statute further ordains as follows, that all gifts, grants, feoffments, fines, or other conveyance, or estate, by any archbishop or bishop, of any honors, castles, manors, lands, tenements, or other hereditaments, parcel of the possession of his see, to any person or body corporate, *other than the queen and her successors,* whereby an estate should pass, other than for the term of twenty-one years, or three lives, from the commencement of it, and whereupon the old accustomed yearly rent or more shall be reserved, and payable during the twenty-one years or three lives, shall be void. The reservation in favour of alienations to the queen was probably only meant to be in aid of the provisions in the first part of this act just mentioned.

This subject was taken up again in another way, and extended beyond the bishops to other ecclesiastical persons

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by stat. 13 El. c. 10. This act contains two provisions: one to make ineffectual all conveyances by beneficed persons to defeat the remedy which the law gives against their executors for dilapidations; the other to put a restraint upon the leases of other spiritual men similar to that imposed on those of bishops. In the first place, it is enacted, that if any archbishop, bishop, dean, archdeacon, provost, treasurer, chaunter, chancellor, prebendary, or any other having a dignity or office in a cathedral or collegiate church; or if any parson, vicar, or other incumbent of any ecclesiastical living, to which belongs any house or building which he ought to maintain in repair; if any such person make a deed of gift, or alienation of his moveable goods and chattels for the above-mentioned purpose, the successor may commence a suit against the person to whom the deed is made in the ecclesiastical court, for the dilapidations, in the same manner as he might against him if he were the executor.

And, secondly, because long leases were the chief cause of dilapidations, and the impoverishing of successors, it was enacted, that all leases, gifts, grants, feoffments, conveyances, or estates by the master and fellows of a college, dean and chapter of a cathedral or collegiate church, master or guardian of an hospital, parson, vicar, or any other having a spiritual living (other than for the term of twenty-one years, or three lives, from the time any such lease or grant shall be made, whereupon the accustomed yearly rent or more shall be reserved, and payable yearly during the term) shall be void.

This act is followed by another made in the same sessions, 13 El. c. 20., in order "to prevent livings appointed for ecclesiastical ministers being transferred by corrupt and indirect dealings *to other uses*." It enacts, that no lease of any benefice or ecclesiastical promotion with cure, nor of any part thereof not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure, without absence above eighty days

in one year, but shall immediately upon such absence become void. The incumbent is also to forfeit one year's value of his benefice to the poor. To abolish a charge which had been imposed on many of the clergy by the zeal of the reformers, that of providing for exhibitioners at the university, and other persons out of their livings; it is enacted, that the charging benefices with cure with any pension or profit shall be void. However, it is provided, notwithstanding the former clause of this act, that a parson who may by law hold two benefices may demise that on which he does not usually reside to his curate; which however is only to endure as long as the curate resides, without absenting himself for forty days in one year.

These two acts of 13 El. were explained by stat. 14 El. c. 11. As to the last of them, it was thought that bonds and covenants to enjoy land, not being leases, were not within the restriction of the statute; wherefore it is declared, sect. 15. that all bonds, contracts, covenants, and promises, and by stat. 43 El. c. 9. all judgments for permitting any enjoyment of a benefice with cure, or to take the profits, shall be adjudged of the same force as leases; and the like engagements made by curates are to be considered in the same light as demises, sect. 16. Again, as to that clause of 13 El. c. 10. which concerns leases; it is declared, sect. 17. that it shall not be construed to extend to houses, or ground belonging to houses, situated in a city, borough, town corporate, or market town, or the suburbs of them; so as it be not the capital or dwelling house for the habitation of such ecclesiastical persons, nor have above ten acres of ground belonging to it. But leases may be made of such houses as before the stat. 13 El. c. 10. However, they are not permitted by this statute, (14 El. c. 11.) to make them in reversion, nor without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparations, nor for longer term than forty years at the most; nor are any houses permitted to be aliened, unless there be, in recompence

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thereof, an assurance made of lands of as good value, and of as great yearly value at the least, in fee-simple, sect. 19. It is moreover declared, that all money recovered by sentence, composition, or otherwise, for dilapidations, shall, within two years after the receipt thereof, be employed on the buildings, in respect of which it was recovered, on pain of forfeiting double as much as is not so employed, sect. 18.

The next act in the statute-book concerning college-leases is stat. 18 El. c. 6. for maintenance of the colleges in the universities, and of Winchester and Eton; which is followed by another in the same sessions, stat. 18 El. c. 11., intended to explain further the stat. 13 El. c. 10. & 20. concerning dilapidations and leases, which we shall first take notice of as more intimately connected with what has gone before, and close this subject with the former of these two acts. It seems, that many persons had availed themselves of the letter of stat. 13 El. c. 10. to defeat the spirit of it, and had made leases for twenty-one years, or three lives, long before the expiration of former years. It is, therefore, declared, that all leases of spiritual or collegiate lands, whereof any former lease for years is in being, not to be expired, surrendered, or ended within three years next after the making of any such new lease, shall be void. And, moreover, the same provision which had been made by stat. 14 El. c. 11. to prevent an evasion of the stat. 13 El. c. 20. respecting leases of benefices, with cure, was now adopted in the present instance; and every bond and covenant for renewing or making of any lease contrary to the true intent of this act, or of 13 El. c. 10. is made void. Thus far as to an explanation of stat. 13 El. c. 10.

Next, as to the stat. 13 El. c. 20., to enforce the forfeiture there inflicted on the incumbent of one year's profit to be distributed among the poor of the parish, it is ordained, sect. 7., that after complaint to the ordinary, he shall, within two months after sentence, upon the request of the churchwardens, grant the sequestration of such profits

to such inhabitants of the parish as he shall think convenient; and upon the ordinary's default, then every parishioner may retain his tithes, and the churchwardens may enter and take the profits of the glebe-lands, and other rents and duties, until the ordinary grants sequestration; and then to yield account to the sequestrators, who are to distribute the profits to the poor, according to the directions of the act, under pain of forfeiting double the value of such as is withholden, to be recovered in the spiritual court, sect. 7.

The last act is stat. 18 El. c. 6., which relates to the mode of paying the rent upon some of the leases before described. This was made for the better maintenance, as the act says, and the better relief of scholars in the universities, and those of Eton and Winchester; and is said to have been devised by Sir Thomas Smith. It enacts, that no master, provost, president, warden, dean, governor, rector, or chief ruler of any college, cathedral church, hall, or house of learning in the universities; nor the provost, warden, or other head officer of the colleges of Eton or Winchester, shall make a lease of any farm, or lands, tenements, or other hereditaments, to which any tithes, arable land, meadow, or pasture appertains, except one-third part at the least of the old rent be reserved and paid in corn, that is, in good wheat, at 6*s.* 8*d.* the quarter or under, and good malt at 5*s.*, to be delivered yearly, at days prefixed at the said colleges; and in default, to pay in ready money, at the election of the lessees, after the rate at which the best wheat and malt in the markets of Cambridge, Oxford, Winchester, and Windsor, for the respective neighbouring colleges, is sold the next market-day before the rent is due; and all other leases to be void. The wheat, malt, or money coming of the same, to the use of the relief of the commons and diet of the colleges; and by no fraud or colour to be let or sold away, under pain of deprivation of the governor and chief rulers of the college, and all others consenting. These are provisions made for protecting

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ecclesiastical and eleemosynary corporations from dilapidating their possessions, and anticipating the profits of their successors by long and ruinous leases.

There were some alterations made in the rights of persons and of property during this reign, which now come under consideration. That which deserves our first notice is the law against *bankrupts*, which took up that matter in a different way from that in which it had been treated in the time of Henry the Eighth, and laid the basis of that system which has since been framed concerning this description of persons.

Of Bankrupts.

This act is stat. 13 El. c. 7., which complains, that notwithstanding stat. 34 & 35 Hen. 8. c. 4., those kind of persons had much increased: it was, therefore, necessary to make better provision for suppressing them, and to declare plainly who is and ought to be deemed a *bankrupt*, which it does in a very full manner; for it enacts, if any merchant or other person using or exercising the trade of merchandise, by way of bargaining, exchange, re-change, bartry, chevisance, or otherwise, in gross or by retail; or seeking his trade of living by buying and selling, and being a subject born, or denizen; if any person of that description depart the realm, or begin to keep his house, or otherwise to absent himself, or take sanctuary, or suffer himself willingly to be arrested for any debt or other thing not due for any just cause or good consideration; or suffer himself to be outlawed, or yield himself to prison, or depart from his dwelling-house, to the intent to defraud or hinder any of his creditors, being a subject born, of his just debt or duty, shall be taken for a bankrupt.

And for the management of such a person's affairs for the benefit of his creditors, there is power given to the lord chancellor, upon complaint in writing, to appoint, by commission, such wise and honest discreet persons as to him shall seem good, who are to take order and direction with the body of the bankrupt, and also with his money, goods, debts, and chattels; and such lands, tenements, and here-

ditaments which he had when he became bankrupt; in his own right, or jointly with his wife or children, to his own use; or with any other person, for such interest as he may lawfully depart withal. And by deed indented and inrolled in one of the queen's courts of record, to sell or otherwise to order for the payment of his debts; that is, to every creditor a rateable portion according to his debt. And the commissioners are, upon the bankrupt's request, to make a true declaration of the manner in which they have bestowed his effects, sect. 4.

If complaint is made to the commissioners by any party grieved, that the effects of the bankrupt are in the possession of any one, or that any person is indebted to the bankrupt they may send for, by such process, ways, and means as they in their discretions shall think convenient, and examine them, upon oath or otherwise, concerning the same, sect. 5. And if they do not disclose, upon their examination, the whole truth, or deny to swear, they shall forfeit double the value of the thing so secreted, to be levied by the commissioners, of the lands, goods, and chattels, in such manner as was before appointed for the principal *offender*, as the bankrupt is called, to be distributed for the payment of the bankrupt's debts, sect. 6. And if any person fraudulently, or by collusion, claim, demand, recover, possess, or detain any debts, duties, goods, chattels, lands, or tenements, by writing, trust, or otherwise, other than such as he can prove to be due, by right and conscience, on just consideration before the commissioners, he shall forfeit double the value of the thing in question, sect. 7. to be employed as the before-mentioned forfeiture. If these forfeitures amount to more than enough to pay the bankrupt's debts, the overplus is to go half to the queen and half to the poor, sect. 8.

If the bankrupt withdraws himself from his usual place of abode, the commissioners, upon complaint, may award five proclamations to be made in the queen's name, on five market-days, near the bankrupt's house, commanding him

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to return and yield himself to the commissioners at a time and place appointed in the proclamation; and if he disobeys, he is to be adjudged out of the queen's protection, and every person who shall help to secrete him is to be imprisoned and fined as the chancellor (upon the information of the commissioners) shall think meet, sect. 9.

If the creditors are not fully satisfied, they may have their remedy for the residue of their debts as if this act had not been made, sect. 10. And all future effects of the bankrupt, whether lands or goods, are to be appointed and sold by the commissioners for the satisfaction of his creditors, sect. 11. This act not to extend to any assurance of land made *bonâ fide* by the bankrupt, before the bankruptcy, not to the use of the bankrupt or his heirs: and where the parties to whose use it is made are not consenting to the fraudulent purpose of the bankrupt to deceive his creditors, sect. 12.

This was the manner in which a bankrupt was dealt with; who was all through considered as an offender, was stript of his property, both present and to come, and, after all, still left to the mercy of his unsatisfied creditors, without the least means of being likely to pay them.

Fraudulent conveyances.

The two statutes concerning fraudulent conveyances come next under consideration. Several acts had been formerly made on this subject (stat. 50 Ed. 3. c. 6. 3 Hen. 7. c. 4.), but none of them had gone so far as the two following to restrain these feigned gifts. The first is made in favour of *creditors*; the other in favour of purchasers. By stat. 13 El. c. 5. it is complained, that gifts and conveyances are made of lands and goods, with intent to hinder or defraud creditors and others of their lawful demands; for prevention of which it is enacted, that every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods, and chattels, or of any of them; or of any lease, rent, common, or other profit or charge out of the same lands or goods, by writing or otherwise; and every bond, suit, judgment, and execution

for any intent or purpose before declared, shall be deemed (only as against that person, his heirs, successors, executors, administrators and assigns, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortmanes and reliefs, might be in anywise hindered, delayed, or defrauded by such fraudulent practices,) void and of no effect. And all parties to such fraudulent conveyance, knowing it to be such, who shall put in use, avow, maintain, justify, or defend it, as made *bonâ fide*, and upon good consideration; or shall assign the lands or thing so conveyed, shall forfeit one year's value of the lands, and the whole value of the goods and chattels conveyed; and as much money as is contained in such feigned bond, half to the queen and half to the party grieved, to be recovered in any court of record, sect. 3. This act is not to extend to any estate or interest, made *bonâ fide*, and upon consideration, to any person not knowing at the time of such fraud or collusion.

To avoid the like fraudulent conveyances when made to deceive *purchasers*, it is enacted by stat. 27 El. c. 4. that every conveyance, grant, charge, lease, estate, incumbrance, and limitation of uses, out of any lands, tenements, or other hereditaments whatsoever, for the intent to defraud such persons, bodies politic or corporate, as shall purchase in fee-simple, fee-tail, for life, or years, the same lands, or any rent, profit, or commodity out of them, shall be deemed void, as against such purchasers and all persons claiming under them. This is confined only to *real property*; and there is the same penalty on parties to such practices who are privy to the fraud, and on those who defend the conveyance, as was inflicted by the last statute (13 El. c. 5.), in the very words of that act; and a like clause in favour of those who have taken any estate *bonâ fide*, and upon good consideration, sect. 4., only there is no mention of the requisite added in the former act, that they should not know of the intended fraud. No lawful mortgage made

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bonâ fide, upon good consideration, is to be impeached by this act, sect. 6.

It is enacted, that where a person has made a conveyance, with a clause of revocation at his will or pleasure, and shall afterwards convey or charge the same lands (the first conveyance not being revoked), such former conveyance, as against the said vendees or grantees, shall be void, sect. 5. It is also provided, in order to make such transactions notorious, that statutes merchant and staple shall, within six months, be entered in the office of the clerk of the recognizances established by stat. 23 Hen. 8. c. 6. Statutes not so entered are to be void against all such as shall purchase for good consideration the lands which were liable to them.

Recovery suffered by tenant for life.

If fraudulent conveyances deserved the notice of parliament, so did those feigned recoveries which were suffered by persons not having an inheritance in prejudice of those who stood in remainder or reversion. We have seen that, by stat. 32 Hen. 8. c. 31., a recovery had by assent of parties against the tenant for life was to be held void; but an opinion had prevailed concerning that statute which had opened a way for evading it. It was held, that if tenant for life made a lease for years, and the lessee for years had made a feoffment in fee, and the feoffee had suffered a common recovery in which the tenant for life was vouched, this was out of the purview of the statute, because the tenant was not seised for life, but had only a right, and because he in remainder had only a right, for all was divested by the feoffment. It was judged necessary to prevent such covenous recoveries effectually, and to extend the restriction to those who had even something more than an estate for life. It was therefore enacted by stat. 14 El. c. 8., that all recoveries had or prosecuted by agreement of the parties against tenants by the curtesy, tenants in tail after possibility of issue extinct, or for term of life or lives, or of estates determinable on a life or lives, or against any other, with voucher over such particular tenant, or of any having,

or that had right or title to any such particular estate, shall be utterly void as against those intitled in reversion or remainder; though a recovery had by these particular tenants with assent of him in reversion or remainder, so as such assent appear of record, shall be notwithstanding good.

Recoveries, effect of.

The decision in the time of Queen Mary, that an entail in use might be barred by recovery, did not so thoroughly close that question as not to leave a pretence of argument against it; and we accordingly find it argued, amongst other points, very strenuously by Plowden, in *Mansel*'s case, in the early part of this reign, that a recovery could not bind an estate tail of a use. The decision in this cause is not known (Plowd. Mansel's case), but it seems to have been taken for established law, all through this reign, that a use might be barred the same as an estate in possession.

In the course of this long reign many points arose upon the nature and effect of a common recovery, which had now grown to be the usual method of conveyance where the grantor was seised in tail, and was applied in other instances where some contingent claim or latent title was to be barred. Thus, when a tenant in tail was married, a recovery was as necessary to bar the wife of her dower as to bar the issue; and in such cases the writ used to be brought against the husband and wife jointly, or they were vouched jointly. A recovery of the former kind was suffered, and the wife surviving the husband, it was long argued, that because the wife was named jointenant and vouched as such, and as she survived, the recompence should be construed to go to her; it was therefore concluded that the issue were not barred. But it was determined, that the wife should be understood to have been named only to bar her of her dower; which, therefore, should be barred by the recovery as well as the estate tail. *Ease* v. *Snow*, 20 El. Plowd. 514.

In the twenty-third year of the queen, two very important cases were determined on the nature of a recovery. The one was *Capel*'s, and the other *Shelley*'s case. The former

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was thus: a tenant in tail in remainder had granted a rent charge issuing out of the land entailed; afterwards the tenant in tail in possession suffered a recovery, and died without issue; and the grantor being the next remainder-man, the grantee distrained for the rent, and it was resolved by all the judges, that the recoverer, and those who came in under their estate, should not be subject to the charge of him in remainder; and this decision they grounded on three reasons: 1st, because a lease or rent granted by him in possession being good and lawful, it was impossible that a similar charge made by the remainder should stand with it *simul et semel*; 2dly, because it is a condition tacitly annexed to all such grants by remainder-men, that they are not to take effect till the remainder comes into possession; 3dly, because the grantee of the rent charge could not falsify the recovery in the present case. 1 Rep. 61.

Shelly's case.

Shelly's case was a cause that long engaged the attention of lawyers. The principal point turned upon the execution of a recovery, and this involved other considerations which do not exactly relate to the present inquiry; but on this, as on former occasions, we shall not think ourselves so rigidly bound to method, but that we may make the institutional and systematic submit to the historical; and, therefore, considering this case as a very important fact, we shall mention it at large, notwithstanding some parts of it may not contribute to illustrate the nature of recoveries. The circumstances of this case were as follows: *Edward Shelly* had issue an elder son, and a younger named *Richard*; the eldest died leaving a daughter, his wife enceint with a son named afterwards *Henry*. *Edward*, being tenant in tail, covenanted to suffer a recovery to the use of himself for life, remainder to certain persons for twenty-four years, remainder to the heirs male of the body of the said *Edward*, and of the heirs male of the bodies of such heirs male, with remainder over. *Edward* died between five and six o'clock in the morning of the first day of the term; the same day the recovery passed, and immediately after judgment an *haberes*

facias seisinam was awarded, and ten days after the recovery was executed, and two months after the wife of the eldest son was delivered of *Henry*. The land was in lease for years at the time of the recovery. *Richard* the uncle entered, and *Henry* entered upon him. And the question was, whether this entry of *Henry* upon his uncle was lawful; and this depended on the point, whether *Richard* was in by descent or purchase. The business of *Richard* was to argue that he was in by purchase, and of *Henry* that *Richard* was in by descent.

To make way for *Richard* to claim by purchase under the new settlement, it was necessary for him to show that the recovery had been completed so as to bar the first entail. They therefore argued, that execution might be sued against the issue in tail; because the judgment being against the tenant, and for the tenant to have in value against the vouchee, the right of the estate tail, shall be bound by the judgment, and not by the execution; but as the land was in lease, they held the recoverers had not the reversion presently by the judgment before execution: and, then, 3dly, to show Richard was in by purchase, they contended that what vests originally in the heir, and was never in the ancestor, vests in the heir by purchase, and the use in question vested originally in *Richard*, and was never in *Edward*; therefore they concluded *Richard* took it by purchase. To prove the minor proposition, they said no use could be raised before the recovery executed, for the use arises out of the estate of the recoverers; and not being executed in the life of *Edward*, no use could arise during his life, and it was impossible he should be in by descent; for no use, right, title, or any other thing touching the uses descended to him, but only a thing intended, and they said it was like the case in 9 Hen. 7. (9 Hen. 7. 25. a.) where a condition descends to a daughter, and she enters for the condition broken; and the son, born afterwards, shall never enter on her there, although she is in by descent, yet because she was the first in whom it vested, the posthumous

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son shall not devest it. And further they contended, that notwithstanding the recovery had been executed in the life of *Edward*, yet ought Richard to take by purchase as *heir male of the body of Edward Shelley*, for the subsequent words, *and of the heirs male of their bodies*, being words of limitation, have nothing to attach upon, and so can have no sense or meaning, unless the first are construed to be words of purchase. (1 Rep. 93, 94, 95.)

The conclusions founded on these three points were combated by the counsel for *Henry*, whose title was to be supported by maintaining the direct contrary. First, therefore, they laid it down for law, that execution could not be sued against the issue; and, therefore, the issue, not being barred, Henry was intitled under the first entail. As it was agreed, on the other side, that the judgment only against the tenant did not bind the issue, but the judgment to recover in value, they argued from this concession, that the issue were not barred, for they could not have any recompence in this case; because execution could not be sued against themselves, and they were not entitled to recompence in value, till execution was sued against them. Now execution could not be sued against them, because, as they claimed by a title paramount to recovery, they could not be bound by it; though he would, if execution was sued in the life of the tenant, because then he would be intitled to execution over. And they said it was the same in a fine: if the issue were remitted before all the proclamations passed, they were not barred, notwithstanding the very express words of stat. 32 Hen. 8. Several cases were quoted to prove, that upon a feigned recovery against the father, execution could not be sued against the issue in tail.

As to the second point, they said, if it was necessary execution should be had in the life of *Edward*, that it was executed by the judgment of law; for, as the recovers cannot, they said, sue execution against the lessee for years, they shall be adjudged by law in execution presently; and this was the difference between lands in possession of the

tenant at the time, and those in lease for years. They concluded, therefore, that if the judgment was thus executed by operation of law, then the estate tail to the heirs male of his body was in *Edward Shelley*, and consequently the entry of *Henry* was lawful.

But admitting the two first points to be against Henry; yet, they contended, that supposing execution might be sued against the issue, and the recovery was not executed in the life of *Edward*, the entry of *Henry* was lawful, which was the third and great point in the cause; and for this they had six reasons, which were shortly these: 1st, When it became impossible, by the act of God, that execution should be sued against *Edward*, no person who otherwise would have received a benefit shall be prejudiced thereby. 2dly, Then they laid it down as a rule, that where the heir takes any thing that might have vested in the ancestor, the heir should be *in* by descent, and here the use might have vested in *Edward;* and as Richard, in that case, would have taken the use in the course and nature of descent, he should take it in the same course now. And they said, in answer to what had been alleged, that though this was neither a right, title, or use, but only a possibility of a use, yet if on performance of a condition it might have vested in the ancestor, it should rest in the son by descent; and they denied the case, 9 Hen. 7. should be understood, as stated: for if the daughter had paid any sum of money, perhaps the law would allow her to detain the land, upon the principle, that *qui sentit onus, sentire debet et commodum;* yet, if the condition was performed by the feoffee, the law was clearly otherwise, namely, that the son might enter.

Further, 3dly, they said, the execution of the use should relate back to the recovery, and the indenture of covenant, which was the *fons et origo* of the settlement, or, as they called it, *the* mother, which conceived the use; and as it is all one transaction, the law will regard the original act. If the indenture is to have this influence, in point of time, so might it, in point of direction and limitation of the estate;

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and they direct that, after the death of *Edward*, the heirs male of his body should have the land, and these words give it by way of limitation of estate, and not by way of purchase; so that *Richard* must take by descent.

4thly, In addition to this, they said, it should be considered that this was a use, and uses had always been governed by the intention of the parties; and they said, it appeared from many circumstances, that *Edward* meant the son of his eldest son should be benefited; and, amongst others, the general term, *heir male*, would not have been used if it had been designed to go to the uncle. They thought, upon the face of this deed, the eldest son's son would have had the *subpœna* at common law, and from thence they concluded he should be intitled to the execution of the use; and to this may be added, that the stat. 27 Hen. 8. speaks of trusts and confidences; so that although no use arose in the life of *Edward*, yet there was a trust and confidence expressed in his life; and when the use was once raised, it ought to vest according to the trust and confidence declared in the indentures.

5thly, If the vesting of the use was not to depend on the indentures and recovery, but on the suing of execution, it would make the whole settlement depend on the will, first of the recoverors, who were intended only as instruments, and, in the next place, upon the sheriff and his officers, who might hasten or retard the execution of the writ as they pleased, which would lead to infinite absurdities, which the law would never endure.

6th, and lastly, it was argued, that the uncle could not take by purchase as *heir male of the body of Edward*, because a daughter of the eldest son was alive, and heir general; and though he might take as heir male by descent to the exclusion of her, *per formam doni*, yet he could not take by purchase, and this distinction they supported by an opinion in 9 Hen. 6. (9 Hen. 6. 24.) of a remainder to heirs female of the body of T. S., and T. S. had a son and a daughter: and by another in 37 Hen. 8. (Bro. *done*. 42.) of a remainder of gavelkind-lands to the right heirs of T. S.

And when the other side contended this was helped by the statute *de donis*, they said, that act made no estates tail, which were not before fees conditional; and if a remainder had been limited in this way, before the statute, the uncle could not take in the life of the daughter of the eldest son.

In answer to what had been alleged on the other side, that *heirs male of the body of the heirs male* must make the first *heirs male* a purchaser, or they would have no sense or effect, they laid down this old rule of law, that where an ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs in fee or in tail, then *heirs* are words of limitation, and not words of purchase; and this they supported by *the Provost of Beverley's* case (40 Ed 3. 9.), and other cases so far back as the reign of *Edward* the Third. Therefore, in this case, as *Edward* took an estate of freehold, the *heirs male* must take by descent, and if they were construed words of purchase, then all the heirs male of *Edward*, if not also heirs male of *Richard*, would be excluded, which would be contrary to the express limitation of the deed. Their construction, therefore, of the words was, that the former include the latter, so that *heirs male of the body* were only declaratory of the former, and do not at all restrain them. And further they said, if *Richard* did not take by descent, he could not take at all; for where an estate is given to a man, and in the same deed there is a limitation to his heirs, the heir takes by descent, and not by purchase; and if the first person does not take, the heirs cannot take at all; for which, among others, they founded themselves on *Bret* v. *Rigden*, where the devisee for life dying in the life of the testator, the heir of the devisee was not allowed to take by purchase, and could not take by descent what never was in his ancestor, therefore he took nothing.

This was the substance of the arguments used on both sides in this famous cause, which was argued three several days in the court of King's Bench; when the Queen, to

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prevent further litigation, sent letters to the Lord Chancellor *Bromley*, requiring him to summon all the judges before him, to have their opinion upon the points in question. At the first argument, the Chancellor declared his opinion upon the third point in favour of *Henry*. After one or two more meetings, the judges, with the dissent of a puisne judge of the Common Pleas, delivered their opinion, that the entry of *Henry* was lawful. And when this opinion was delivered in court by Sir Christopher Wray, and he was pressed by the counsel for Henry for the reasons of the judgment; he said, that on the first point, the *better* and greater part of the judges held, that execution might be sued against the issue, because the right of the entail was bound by the judgment. As to the second, they agreed, that the reversion was not in the recoverers immediately by the judgment; and as to the third, they all agreed, except one judge of the Com. Pleas, that the uncle was *in*, in course, and nature of a descent, though he should not have his age, nor be in ward, &c., and for this they gave four reasons: 1st, because the original act, namely, the recovery, out of which all the uses and estates had their essence, was had in the lifetime of *Edward*, to which the execution after had a retrospect; 2dly, because the use and possession might have vested in *Edward*, if execution had been sued in his lifetime; 3dly, because neither the recoverers by their entry, nor the sheriff by doing execution, could make whom they pleased inherit; 4thly, because the uncle claimed the use by force of the recovery and indentures, by words of limitation, and not by words of purchase; and there were the principal reasons of the judgment; and it was resolved by them all, that notwithstanding the death of *Edward*, between five and six in the morning of the same day, yet the recovery was good.

Archer's case.

Towards the close of this reign, a case, very much like this, was determined in a manner that tended to the construction of this rule, extremely exact and defined. This was of a devise for life to *A.*, and afterwards to the next heir male

of *A.*, and to the heirs male of the body of such next heir male. This was *Archer*'s case. And there it was agreed by the whole court of common pleas, that *A.* took but an estate for life; for he had an express estate for life devised to him, and the remainder is limited to the next heir male in the singular number. And they held the remainder good, although *A.* cannot have an heir during his life, for it is sufficient that the remainder vests *eo instanti* that the particular estate determines; and further (which was the principal point in this cause), it was held that the feoffment of *A.* destroyed the remainder to his right heirs, because every contingent remainder ought to vest either during the particular estate, or *eo instanti* that it determines; now here the estate for life determined by a condition in law annexed to it, and there can be no heir of *A.* during his life, therefore it is wholly gone, (Archer's case, 40 El. 1 Rep. 66.) which point had been agreed by *Popham* and the other justices in *Chudleigh*'s case. (*Ibid.*) This case, therefore, deserves great notice, not only for what *Coke* calls the principal point, namely, the feoffment of tenant for life destroying the contingent remainder, but also for the above opinion on the limitation to the *heir* in the singular number. These repeated opinions concerning the distinction of remainders by the feoffment of tenant for life, and to the devise which was introduced some years after, of giving an estate to certain trustees next to the tenant for life; who, upon the forfeiture of his estate by alienation, became entitled to enter, and so preserved the contingent remainders that were afterwards to arise. This was particularly necessary in all marriage settlements, where the husband had only an estate for life, and a remainder being limited, as in the present case, to the *heir* or *eldest son*; for in the latter case he might destroy the remainder before a child was born, and in the former he might bar it at any time, for there is no such person as *heir* during the life of the ancestor.

But where a man and his wife were seised in tail, with

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remainder over, and a recovery was had against the husband alone, it was resolved that it should not bind the remainder; for between husband and wife there are no moieties, and the husband had notpower to sever the jointure, or dispose of any part of the land; so that the *præcipe* being brought against him alone, the recompence could not for any part enure to the estate-tail, or to the remainder; for to the whole estate it cannot enure, because the wife, who had a joint estate with him, was not party; and it cannot be good for a moiety, as there are no moities between husband and wife, and the remainder depended upon the entire estate to the husband and wife, to which no recompence could enure on a recovery against the husband solely, (*Owen* v. *Morgan*, 27 El. 3 Rep. 5.); and this reasoning they thought conformable with the decision in *Fullarum*'s case. However, in *Cuppledike*'s case, in the court of wards, where a man and his wife were seised to them and the heirs of the husband, and he alone was vouched in a common recovery, that the remainder was bound, notwithstanding the wife, who had an estate, was not vouched; for the husband came *in* in privity of the estate-tail, and the recovery in value goes to those in tail and in remainder. And they held, where *A.* was tenant in tail, remainder to *B.* in tail, with divers remainders over; and *A.* made a feoffment, and the feoffee suffered a recovery in which *B.* was vouched; here *A.* was not bound, but *B.* and all those next in remainder; for, though by the feoffment all the remainders were discontinued, and converted to mere rights, yet in the case of a common recovery, which is a common assurance of land, he who comes in as vouchee shall, in judgment of law, be *in* in privity of the estate which he had, although the precedent estate, on which it depends, be devested or discontinued. So here, though the estate of the wife be not recontinued, yet the husband, as vouchee, shall, in judgment of law, be *in* of his estate tail. (44 El. 3 Rep. 6.)

The construction of the statutes of Henry the Eighth, and that of the present reign, upon recoveries, occasioned

some altercation in our courts. In *Wiseman*'s case, a point arose upon stat. 34 & 35 Hen. 8. c. 20. A person covenanted to stand seised to several uses, with remainder in fee to the queen; and it was held that this remainder was barred by a recovery, notwithstanding the above act; for that only related to gifts made by the crown, or by the procurement of the crown; so that, in the first case, the reversion, and in the latter, the remainder in fee, was limited to the crown. 27 El. 2 Rep. 15. Again, where tenant for life bargained and sold the land, and the bargainee suffered a recovery, and vouched the tenant for life before stat. 14 El. c. 8., it was argued in Sir *W. Pelham*'s case, that this was no forfeiture within stat. 32 Hen. 8. c. 31., because the vouchee in this case was not seised for life, but came in only as vouchee; and it was further argued, that when the recovery was executed, the entry of him in remainder was tolled. But the court of Exchequer resolved, that this recovery was a forfeiture of the estate, for as a recovery was now become a common assurance, it was the same as if a fine had been levied, or a feoffment made, and was equally to the disherison of the heir. And, therefore, there was a difference between a recovery, with assent, and one without, though without title. It was also resolved, that the entry of him in remainder was congeable as well after execution as after judgment; for being a forfeiture, the suing execution could not toll the entry. And the court said it would be mischievous, if before stat. 14 El. c. 8. it should be lawful for the tenant for life, by suffering a recovery, to toll the entry of him in reversion or remainder, and put them to a real action; and in proof of it being a forfeiture, they adduced many cases so far back as the beginning of the reign of Edward the Third, some of which also proved that the suing execution was not material. 32 El. 1 Rep. 15.

Feoffment by tenant in tail.

The effect of a feoffment made by tenant in tail was much debated in *Walsingham*'s case, the arguments on which occasion went fully into the nature of estates tail

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and reversions. *Sir Thomas Wiatt* being seised in tail of the gift of the crown made a feoffment in fee; which feoffee infeoffed the ancestor of *Walsingham*. *Sir Thomas* was attainted of treason in the last reign, and in addition to the operation of stat. 26 Hen. 8. c. 13. and 33 Hen. 8. c. 20., the forfeiture of all his estates were confirmed by statute, with a saving of the rights of strangers; and a bill of intrusion being brought against *Walsingham*, it became a great question what estate and right *Sir Thomas* had after the feoffment, and at the time of the treason committed; for if he had no right or title, the land could not come to the crown by forfeiture, for *Walsingham*'s right was saved by the express provision of the act. It was agreed on both sides that the reversion was not devested out of the king by the feoffment, but that remained as before.

But, notwithstanding this concession, it was contended by the defendant's counsel, that the feoffment in fee, with livery, was such an act as conveyed out of *Sir Thomas* his whole estate and interest, and nothing was left behind to be forfeited. And if it was objected that the estate tail did not pass, and therefore must continue in *Wiat*, they said that did not follow, for it might be, that neither Wiatt nor the feoffee might have, but it might be in abeyance of law; and Littleton was of opinion, that an estate-tail once made might be in abeyance; for, says he, if tenant in tail grants all his estate to another, the reversion in tail is not in the tenant, nor can he have an action of waste, because he has not the reversion, sect. 650., and if he had it not in that case, much less has he it in this, for he gave it to the feoffee and his heirs; but Littleton says, the estate tail is in abeyance. And is like a grant for life, remainder to the right heirs of *T. S.* where the tail is in abeyance during the life of *T. S.* And they said the estate given to the feoffee being not in tail, and being for more than his life, must be a fee-simple; but then a fee, determinable on the estate tail, or determinable by the entry of the issue, which they might make after the death of *Wiatt*. And if

the feoffee had one fee-simple and the king another, it was no uncommon thing for these to be two fees-simple. For before stat. 34 & 35 Hen. 8. if tenant in tail, the reversion in the king, suffered a recovery, the recoverer had a fee-simple, determinable on the estate-tail, and the king his ancient fee-simple, and many other instances were quoted where there might be two fees-simple of the same land.

In answer to this, it was said, that no other estates passed by the feoffment than for the life of *Wiatt*, and here it is not so material what words of limitation were used as what estate the law will suffer to pass; and as it was confessed that no fee-simple was devested out of the king, it follows almost of consequence that none passed to the feoffee, for none can give that which they have not, and there was no fee-simple in *Wiatt*, but only for his life, and the estate-tail could not pass to the feoffee, because none could have that but who are comprehended in the intent of the donor; nor could an estate for the life of the feoffee, for that also would discontinue the reversion in the king. If therefore neither a fee nor tail for life of the feoffee passed, it must be for the life of *Wiatt*, for such a one he might make, and then by *Wiatt*'s death it ceases, and he became an intruder on the crown.

They denied the case in Littleton about abeyance to be law; for, as no other could possibly have the estate-tail, to what purpose should it be in abeyance? For an estate is in abeyance only where it cannot vest immediately, but may afterwards, as a remainder to the heirs of *T. S.*, who is alive. And what Littleton there says is contradicted by other passages in his book, as where tenant in tail leases for years, and afterwards releases to the lessee and his heirs: here nothing passes but for the life of tenant in tail. The same where he grants for his own life and releases. (Litt. 606. 612.) And though it was true, as Littleton said, the tenant in tail shall not have waste, yet it was not because the grantee has a greater estate than the tenant in tail, but because the estate of tenant in tail is dispunishable

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of waste; and by the grant he had conveyed his privilege to do waste. So that the case in Littleton does not prove that the tail is out of the tenant, or that the grantee has a greater estate than for the life of tenant in tail.

As to the stress that was laid on the word *heirs* in the grant to the feoffee, they said this did not make it an inheritance if the grantor could not give one; but it gave descendible freehold during the life of *Wiatt*, and *heirs* was only inserted to prevent occupancy; for it did not amount to a fee simple determinable, as he called it, that is determinable on *T. S.* dying without issue, for such an estate depending only on the failure of an estate of inheritance they admitted to be a fee-simple, but yet a fee-simple determinable. And they inferred, from a case in 18 Ed. 3., that after this feoffment, reversion of the tail remained in *Wiatt*.

But however the law was as to the tenant in tail himself, and though he should not be permitted to say against his own feoffment that the estate-tail continued in him; yet they contended the crown may say that the estate-tail continued in *Wiatt*. And if the feoffment could not discontinue the reversion, no more should it devest the crown of any advantage it might have from the estate-tail continuing: so that it shall continue for the benefit of the king. And for support of this they quoted 21 Ass. 15. and 40 Ass. 36.

Plowden, who was one of the counsel on this occasion for the crown, made this last point a distinct consideration; namely, whether the entail should be said to be extinct, and the crown should have the land by way of revester or of forfeiture, and he contended she should have by revester; for, considering stat. 26 Hen. 8. c. 13., how shall land be forfeited to the king and his heirs, where he had the fee-simple before? for this would make two fees-simple in the same person. And he contended that the king should hold it as in his ancient fee-simple, discharged of the entail, and all leases and incumbrances made by

the tenant: and this was decided in *Austin*'s case, in the last reign, upon a lease made by the same *Sir Thomas Wiatt*.

The court of exchequer took a whole year to determine this matter; and in the 15th of the queen, *Saunders*, the chief baron, informed the counsel, that after frequent conferences with his brethren, they were unanimous that judgment should be given for the crown. He said, in the name of the whole court, that they held the entail to remain in *Wiatt*, notwithstanding the feoffment; as none could have the entail, but who were within the intent of the donor. They all held the difference put by Littleton not to be law; for when tenant in tail grants all his estate, and when he makes a lease for his own life, it is the same thing; for the lessee has it for the life of the tenant, out of whom the entail never passes. And there is no ancient book that warrants the idea of the tail being in abeyance; nor is there any more reason why it should, than where he makes a lease for his own life, and afterwards releases all his right: and this seems proved by the words of the writ of *formedon in discendre*, namely, that the right descended from the feoffer (that is, the tenant in tail infeoffing) by the form of the gift; and if it descended from him, it must be *in* him at the death. And by *Treboney*'s case, 48 Ed. 3., the reversioner may avow upon the tenant in, notwithstanding his feoffment. And they agreed that 18 Ed. 3., the 21 Ass., and 40 Ass. before-mentioned, proved the reversion in the crown not to be touched by the feoffment. They held the estate-tail extinct in the fee-simple which was in the crown; and to this purpose they approved the case of *Austin*. So they gave judgment for the queen.

But in the 17th year, the same question was brought before the court of common pleas in an action of trespass, and they determined it the other way. (N. Bendl. 260. pl. 272.) This encouraged Sir Thomas Walsingham, in 20 Eliz., to bring a writ of error in the exchequer chamber, where the whole matter was argued again, and much the same topics

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were urged on both sides, and enlarged upon. And in the 21st the former judgment was affirmed. A flaw had been discovered in the record, which operated in favour of the queen; and when the chancellor was pressed by *Plowden* to inform them of the ground upon which they affirmed the judgment, the chancellor and the lord treasurer declined it; saying, they knew the cause, it was not necessary to declare it. The reporter seemed to have discovered that they all agreed that the flaw was fatal; but that they were not unanimous upon the point of law. So that after all, upon this question, there is only the judgment of the court of exchequer against that of the common pleas.

To render fines and recoveries, on which so much landed property was now settled, of as great credit and authority as possible, it was provided by stat. 23 El. c.3., for their due inrolment, in the following manner: First, of fines; every writ of covenant, and other writ on which a fine shall be levied, the return thereof, the writ of *dedimus potestatem*, made for the acknowledging the fine, with the return thereof, the concord, note, and foot of every fine, the proclamations made thereon, and the king's silver: next, as to recoveries; every original writ of entry, or other writ whereupon any common recovery shall be suffered, the writ of summons *ad warrantizandum*, with the returns thereof, every warrant of attorney, as well of the demandant and tenant as vouchee, then extant or remaining, may, upon request or election of any person, be inrolled in rolls of parchment; and such inrollment is to be of the same force in law, to all intents and purposes, for so much of them as shall be inrolled, as the same being extant and remaining ought to be.

To make these inrollments of further security it is also provided, that no fines, proclamations upon fines or common recoveries, shall be reversed for false or *incongrue* Latin, rasure, interlining, mis-entering of any warrant of attorney, or of any proclamation, mis-returning, or not returning of the sheriff, or other want of form in words and

not in substance. Persons taking the acknowledgment of a fine or warrant of attorney of a tenant or vouchee for suffering a recovery, shall, with the certificate of the concord and warrant, certify the day and year when the same were acknowledged; nor is the clerk to receive the certificate any otherwise, under pain of *5l.*

To carry this act into execution, it is also enacted, that there shall be an office called the *Office of inrollment* of writs for fines and recoveries, under the care and charge of the puisne judges of the common pleas. As to fines, it is further directed, that the chirographer shall make out for every county a table, containing the fines passed in every one term, to be hung up all the term, next after the ingrossing, in some open place in the common pleas; and shall deliver to every sheriff, before the assizes, a copy of fines levied for his county, to fix, every day during the assises, in some open place in court, under penalty to the chirographer and sheriff, whoever omits his part, of *5l.*

Statute of fines.

The construction of the late statutes of fines, 4 Hen. 7. and 32 Hen. 8., was not settled till after long debate and some difference of opinion among the judges. It was much agitated in the beginning of this reign, whether, if the five years had commenced, and upon the death of the ancestor the right descended to an infant, the infant should be bound, or should have another five years after he came of age. This was the point in the great cause of *Stowell* v. *Lord Zouch*, in the fourth year of the queen. The ancestor of Lord Zouch being disseisor of Stowell, the grandfather of the demandant levied a fine with proclamations. The disseisee died three years after, but within the five years, leaving the demandant his heir within age, who came of full age after the five years expired, and within a year afterwards entered to avoid the fine, and then brought the present writ of entry. It was long argued in the common pleas whether the entry was good. The chief Justice *Dyer* and *Weston* were of opinion it was not; *Walsh* and *Brown* held that it was. On account of this difference of opinion,

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they adjourned the matter into the exchequer chamber for further argument; and here the judges differed. For it was held by *Harper* (who had been counsel for Stowell, and upon the death of *Brown* was made a judge) by *Walsh*, and by *Saunders* chief baron, that the law was with *Stowell*; all the others held the contrary, and to them *Walsh* also came over, having changed his opinion after the argument; so that judgment was given with the dissent only of *Harper* and *Saunders*, that the five years, when once commenced, should run on so as to bar an infant.

To comprehend what was said in support of the two opinions, the act must be considered as divided into four parts; the body, the exception, the first saving, and the second saving; so that they made five points to discuss. 1st, Whether Stowell should be bound by the purview, or whether he should be out of it by reason of the exception. 2ndly, If he was, whether he has availed himself of the time prescribed by the purview. 3dly, If he was bound by the body, and not within the exception, whether he should be aided by the first saving. 4thly, If not, whether he shall be aided by the second saving. The fifth point was the equity of the act.

Those who argued for the demandant fought through every branch of the act, maintaining that Stowell was not bound, or if bound, was aided by the exception or savings; and the substance of what they said seems to have been this. They first considered the effect and operation of a fine at common law, and before the statutes. They admitted the great power that was ascribed to it by our old law; but yet there was always a tenderness for former rights, and the time of a year and a day was limited within which persons who had a right might put in their claim; and it was not till that indulgence had been neglected, that a person was barred. But those who were expected to make this claim were persons of full age, who had sufficient discretion to pursue and vindicate their rights. Infants were not precluded even after the year and day had expired; and this is

plainly intimated, first by the stat. *de donis*, which says, that it shall not be necessary for the reversioner to put in his claim, *although of full age*; secondly, by stat. *de modo levandi fines*, which says, a *fine* bars all persons being of *full age*. And if infants are not bound to claim within a year, they are bound to no time at all, not to year and day after they come of age. And *Brown* therefore said, if a disseisor levied a fine, and the disseisee, being of full age, died within the year without claim, and the right descended on his heir within age (which was precisely the case here), he was not bound by the time having first attached in his father. For the same reason which exempted him, being an infant, from making claim within the year and day, if he had right at the time of the fine, exempts him, being an infant, now the right descended within the year and day; for the father, who died before the time was elapsed, could not be said to have surceased during the year and day, and the infant was bound to no time, being within the same reason of law as where he had right at time of the fine. The same where there was tenant for life, with reversion to an infant, and the tenant aliened, and a fine was levied, and tenant died within the year, the infant was at large. Thus the law stood before the stat. of non-claim, 34 Ed. 3., after which the law authorised a claim at any time.

The stat. 4 Hen. 7., they said, was to remedy the mischief introduced by the statute of non-claim, and to restore the credit of fines, by obliging parties to make their claim as at common law within a limited time; but that time was enlarged from one year and a day to five years. They, therefore, considered much of the above reasoning to be still applicable to all entries to defeat fines: and as to the stat. 4 Hen. 7., they maintained that Stowell was out of the letter, or at least out of the sense of the letter of every branch of it; and if he was within the letter of any branch, he was at large by some other branch, and so not bound.

Now, as to the first point, they said, that by the body of the act privies and *strangers* were to be bound, *except*

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infants, &c. And how does the present case stand? Why Stowell, the grandfather, was a stranger to the fine, and so was bound; but Stowell, the heir, was a stranger, but he was within age, and so, by the exception, not bound; being excepted, he is the same as if the act had not been made, unless the saving had followed to qualify the exception, and that obliges him to claim within five years. And because it was said, on the other side, that the persons intended by the exception were those who had right at the time of the fine, which *Stowell* had not, and so is not within it; and in proof of this they alleged the first saving clause, which speaks of persons HAVING *right*, which, they said, must mean at the time of the fine. In answer to this it was said, that the act was general, and was meant to bar as well those who had any pretended right, as those who had a real right, for the object was to obtain peace and quiet, and the statute would be as useful a plea in bar to one as the other; and the clause they allege is general, *having right*, that is, at the time of entry, and not at the time of the fine; and it was more material to bar those who had right at the time of the suit (when it was to be tried) than at the time of the fine, for that might afterwards pass away: therefore they said there was nothing in the exception, nor in this alleged clause, nor the following, that showed the persons excepted were such as had right at the time of the fine. Stowell, therefore, was within the exception; and further, if he is not within the exception, he is not within the purview; for it would have been idle to except any but those who would be bound by the purview; so that the argument was retorted upon those who adduced it: and *quâcunque viâ datâ*, Stowell is not bound, and has time to enter within five years after his full age. But admitting him to be comprised within the exception, they said he had complied with that clause which binds persons excepted to make their entry within five years, by entering within five years after he came of full age, and that was the second point.

Admitting the demandant to be bound by the body of the act, and not to be within the exception, then they con-

tended he was aided by the first saving, and this was the third point in the cause. Now they said the saving was to Stowell the grandfather and his *heirs*, which includes the demandant, but then it is on condition of pursuing his remedy within five years. And here they said the statute must be construed by the usage of the common law, and that did not require infants to pursue their demands, for all actions by infants would be fruitless, as the parol might demur, and the like; therefore, though the right of Stowell is saved under the word *heirs*, yet when the act says, so that *they* pursue, &c., it must mean such heirs as are of full age and able to sue. And statutes, they said, had always been construed with such reserve; for stat. West. 2. c. 25., which says, that a disseisor in assize, who vouches a record and fails, shall be imprisoned, has been construed not to extend to an infant; and again, notwithstanding the general words of stat. West. 2. c. 11. auditors cannot commit an infant to the next gaol, and so under stat. West. c. 6. an infant who ravishes the king's ward cannot be imprisoned. In these and other statutes, though an infant is within the letter, he has always been construed to be without the meaning, because of his want of discretion.

And, in this case, they said this construction ought to be made, for in preservation of a right, a right favoured by the old law, which, as has been already shown, would not suffer infants to be barred by a fine; and as this statute was in support of the common law, it ought to be construed in the same way. And they thought this construction would be well warranted if there had been nothing else in the act to favour it.

But this construction appears to be pointed out by other parts of the act; for if the act in the exception protects those who had a present right, and were under the disability of infancy, does not the same intent hold place with respect to rights, which are not bound until five years are passed, come to such disabled persons within the five years? There is the same reason to allow it at the end as

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at the commencement of the five years. And he said, by the second saving future rights were protected, *so that they or their heirs take their action next after that they*, &c. which is the same as saying, next after that he or his heirs are of full age. So they took this second saving as a construction of the first, and argued that if in a future right the heir was to have five years after he was of full age, *à fortiori*, Stowell should have it to support a present right.

Further, they said, as to the fourth point, if Stowell was bound by the body of the act, and is not within the exception, nor the first saving, he was yet within the second. For the right came to Stowell *by descent*; it *first descended to him after the fine*, and it descended *by cause or matter had or done before the fine*, for the disseisin was before the fine, by means of which the possession went one way, and the right remained in another, so that every word of the clause is satisfied. And though the right was in the grandfather, yet Stowell was the first to whom it descended, and then it descended in another way than it was in the grandfather, and so may be considered as another person than the heir of the grandfather who was of full age, and therefore he is within the words, so they contended he was within the second saving. But, if Stowell was within the body of the act, and not comprised in the exception, nor the first or second saving, they then resorted to the fifth point, and maintained that he should be aided by the equity of the act.

The justices who argued on the other side were *Carey* (who had been counsel for the tenant, and was made a judge of the king's bench upon the death of *Corbet*), *Southcote*, *Weston*, *Whiddon*, and the two chief justices, *Dyer* and *Catline*; and they began by impressing that great consideration respecting fines, namely, that they were designed for quiet and security of property, and that great mischief had been introduced by the statute of non-claim, which annihilated this principal effect of a fine. By this reasoning they seemed to intimate that the governing idea in the

making of stat. 4 Hen. 7., and in the construction of it, should be the silencing of claims, and the barring dormant rights. And they were all of opinion, that, upon weighing the statute, *Stowell* seemed to be entitled to no benefit of his nonage, but that he should be concluded by the purview of the act, and was not let at large by any of the other branches.

They said that the purview was as full and as strong as words could be; it declares that it shall be *a final end, and conclude privies as well as strangers;* and it could not be said to be final if others were to set up claims against the conusee, and the intention was not so much to preserve old rights as to extinguish them. And *Catline* said, all infants were bound which were not within the exception, for if he levied a fine with proclamations he could not have a writ of error, because he is not within the exception, for those excepted are infants, not parties to the fine; but he being *privy* is bound by the purview, but some of the judges thought this case within the exception. They all contended that the exception included such infants as had right at the time of the fine, and no others; and here the purview being against those who have right, it would be idle to except infants who had none. And as to what had been said, that the purview and exception be construed as well against those who had no right as those who had, they said, that right or no right was of no consequence, for the fine might be pleaded equally against both; but the matter was, claim of the right or non-claim within the five years, and that would be the issue; and in every action brought a right is claimed, and by such a plea the right would be confessed and avoided; therefore, if no well founded right, it would be still admitted to be such by the pleadings. Therefore, it is not proper to say that the act is made against those who claimed no right. The purview, they said, most certainly extended only to those who claimed a right, or had title or right in possession, reversion, or remainder to the thing comprised in the

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fine at the time it was levied, or afterwards, upon cause arising before; and the exception of infants means such as had right at the time of the fine, which *Stowell* is not, for his grandfather then had it, and the purview takes effect against him. And *having right*, &c. in the latter clause, they said, meant at the time of the fine. So they clearly held *Stowell* not within the exception.

As to the first saving, they said, it was general, and accompanied with a condition which ought, in reason, to be taken as generally as the saving. The saving is to *all persons and their heirs*, &c. *so that they*, &c.; which word *they* means the person who had right, and his heirs, which means generally every heir, whether within or of full age: again, *so that they*, &c., namely, he and his heirs, whether within age or not, pursue the remedy there offered. And if the condition was construed as confined to heirs of full age, it would be lame, because it would not be as full as the saving; and if they meant it should extend only to the heir of full age, there would have been some provision that should bind him to pursue his remedy when he came of age, as was done with regard to those who had present right at the time of the fine, or a future right. But they certainly meant that infants should be included. And when it is considered that the great object was to attain peace and security in estates, it was no unusual policy that a rare case, like the nonage of an infant, should not be suffered to impede a design which extended for the benefit of the whole kingdom. For if every infant was to have five years *de novo*, the delay and mischief might be infinite; for *Stowell* might die before the five years elapsed, and leave an heir within age, and he another, and so on for a century to come, which would lead to innumerable inconveniences and difficulties in all matters of title, and such uncertainty in the trial of them; and this was not consonant to the inclination which had lately been shown by parliament, as appeared by the stat. 32 Hen. 8. for the limitation of suits, and the amendments made therein by stat. 1 Mar. c. 5. So

they all concluded, that the five years attached in the grandfather ought to be pursued by his infant heir the same as they should have been by himself, for they can admit of no intermission, but must continually pass on. *Dyer* denied the case quoted by *Brown* of a fine levied before the statute of non-claim, for he said the infant heir should be bound inasmuch as his ancestor was of full age.

As he was not aided by the first saving, so they held him not aided by the second, and for these reasons. This clause was to *other* persons, which, they said, must be understood to exclude those comprised in the exception and first saving, that is, to those who had not a present right at the time of the fine, and to their heirs. Now the grandfather is within the first saving, but he had not performed the condition of it, namely, to pursue his right; and *Stowell* being his *heir*, is as the same person with him, as to the right, and so he is also within it. So that *Stowell* being in the first saving, is excluded from the second by the term "*others*." Again, it was said by *Dyer*, that he was excluded from the second saving by the word "*first*;" which word, he thought, put into the statute for some great purpose, for stat. 1 Ric. 3. c. 7. had all the words of the purview and body of this act, except the word "*first*," which was, therefore, not added for nothing; and this word should be joined to each of the words *accrue*, *remain*, *descend*, or *come*. So that to take advantage of this clause the foundation of his title ought to be before the fine, and ought *first* to come after the proclamations; as, for an example, among many others, if a mortgagee is disseised, and a fine is levied by the disseisor, and five years pass, and then the mortgagor tenders the money, he shall, by this second saving, have five years after the tender; and so, many cases were put where land might remain, descend, or come after the fine, upon cause arising before. But here, though the right first descended after the fine, yet this was not upon any matter or cause before the fine, for the disseisin was not

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the matter that caused him to have the right, for he would have had it without the disseisin by descent. But the makers of the act intended some special matter, which should be the efficient cause of Stowell having the right, and such a right as was not in any before it was in him, which is not the case here; the right having been first in the grandfather and descended to him, and was saved to him and his heirs by the first saving; and if it should be said, that it was also saved to the heir by the second saving, because it *descended* to him, then one of the savings would be superfluous. Therefore they all agreed *Stowell* not within it; and they likewise held he should not be aided by equity.

These were the reasons given by those who argued by Lord *Zouch*; and they had the effect of inducing *Walsh* to alter his opinion; so that judgment was given with the assent of all but the Chief Baron *Saunders* and *Harper*, who, it must be remembered, had been previously prepossessed by being counsel for *Stowell*: and it is said that *Corbet*, upon whose death *Carey* had been made a judge, had written an argument on the same side. So that this judgment seems to be settled by very great authority, as well as upon great deliberation. It had taken up the minds of lawyers for some time; we are told each judge took a whole day to deliver his argument, and the cause depended from 4 Eliz. to 11 Eliz., when judgment was given in the Common Pleas. (Plowd. 355. to 375.)

A record of a fine stated one of the proclamations to be made on a Sunday; and as the proclamations in this term could, on that account, be only three, it was readily agreed, that such fine had not the binding force given by stat. 4 Hen. 7. But it was argued, that the fine was wholly void; for the party having the choice of levying his fine at common law, had chosen to pursue the statute, and not adhering to it, the whole was void. But all the justices held, that the statute did not ordain a new form of a fine; but a fine remains in substance as it was before the act; and it binds before the proclamations, and the proclama-

tions are a new entry, and a separate record from the fine; and error in them is no error in the fine; accordingly, judgment was given in the King's Bench, for reversing the proclamations, and that the fine should stand in force. (4 & 5 Eliz. *Fish* v. *Broket*, Plowd. 265.)

The object here seems to have been to annul the fine, and to avoid the discontinuance, according to the opinion of Plowden and others; for the proclamations might have been avoided by plea merely; and it had been so adjudged two years before, on demurrer in another action relating to the same entail, and the same parties, (Ibid. 266. Dyer. 182. 55.) as appears both from Plowden and Dyer.

The nature and effect of the proclamations on a fine occasioned new debates on this antient security. Many doubts arose on this subject. One was, where a remainder-man in tail granted a lease on fine *sur grant et rendre*, and all the proclamations passed after his death, and then the tenant for life of the preceding estate died; this was the case of *Smith* v. *Stapleton*; and it was held, after some argument, that the fine was not avoided by the descent of the remainder, notwithstanding the proclamations passed after the remainder-man's death. (Plowd. 430.)

A fine with proclamations, by force of stat. 4 Hen 7. and 32 Hen. 8. was construed to be a complete bar to the issue, whatever became of the estate conveyed by the fine, or whatever claim might be made by the heir; for after the proclamations passed, the heir was estopped to claim any thing. This appears from several determinations in this reign, but particularly from the famous cases of Lord *Zouch*, and those of *Archer* and of *Purslowe*. In *Archer*'s case, in 20 Eliz., the grandfather and his wife were seised in special tail. The grandfather died, and the father disseised the grandmother, and levied a fine with proclamations; the grandmother died, the father died, and it was held, that the son was barred, notwithstanding the father at the time of the fine levied had only a possibility to the estate tail, during the life of the grandmother, for the judges expounded stat. 32 Hen. 8. "intailed to the person levying, or to any of

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his ancestors," so as that the fine should bar the right descending afterwards; both as to himself and those who were heirs in tail to him. (3 Rep. 90.) Again, in *Purslowe's* case, in 24 El., where the proclamations passed pending a writ of formedon, it was held by the whole court, that the fine with proclamations might be pleaded in bar; notwithstanding a right of entail descended, and the right was pursued immediately by bringing the writ of formedon; for the fine was the conveyance, and the proclamations are but a short repetition of the fine, and to show that the fine is levied according to stat. 4 Hen. 7. (3 Rep. 90.)

In the case of Lord *Zouch*, in 28 El. it was resolved by the whole court of common pleas, that the heir in tail was estopped to allege the seisin and continuance thereof in a stranger, at the time of the fine levied, or to aver *quòd partes finis nihil habuerunt;* and upon consideration it was further held, that even before stat. 4 Hen. 7. and 32 Hen. 8. by the better opinion of the books, the issue in tail were not admitted to such averments; and this they thought appeared by stat. 27 Ed. 1. c. 1. *de finibus levatis.* (3 Rep. 88.)

After these adjudications, some of these topics were reconsidered in the great *case of fines* in 44 El. This was upon solemn advice and argument before all the judges. The case which gave occasion to this review of former determinations was this: *A.* tenant for life with remainder to *B.* in tail, the reversion to *B.* and his heirs. *B.* has issue, and levies a fine, and dies before all the proclamations are passed, the issue then being beyond sea; the proclamations are made, and afterwards the issue in tail returns, and makes claim on the land to the remainder in tail, and the judges, in considering this case, came to four resolutions. 1st, They agreed, that the estate which passed by the fine, as to the estate tail, was not determined by the death of *B.* 2dly, That although a right of estate tail descended to the issue, because the tenant died before all the proclamations passed, yet when they did pass, without claim made on the land, the right is barred by stat. 4 Hen. 7. and 32 Hen. 8. And, 3dly, which was the principal point, it

was agreed by all the judges but three, that in the present case, the issue being heir and privy could not by any claim he could make, save the right of the estate tail, which descended to him, but after the proclamations made the estate was barred by the said statutes; and for support of this resolution they founded themselves chiefly on the above cases of Lord *Zouch*, *Archer*, and *Purslowe*. And their 4th resolution was, that the issue being privy, and out of all the savings of stat. 4 Hen. 7. is bound, although he was beyond sea, in the same manner as if he was within age, under coverture, *non compos*, or in prison; and in this opinion they all agreed. (3 Rep. 84.)

The decisions in all the foregoing cases were calculated to give efficacy to a fine when levied, and to prevent it being invalidated by dormant claims, and the title conveyed it, being subjected to perpetual hazards. But this was only to secure those to whom a fine was acknowledged by persons having a good and lawful estate: and not to protect collusive practices, where the conusor had not such estate as he might lawfully pass by fine. The following was an instance, where a fine was made use of in order to trick a lessor out of his inheritance: a tenant for years, and at will, and also by copy, demised all these several lands for life, and then levied a fine of these together with other lands of which he was seised in fee in the same town; and after five years had passed he claimed the inheritance, as if the lessor was barred by the fine and new claim. These were the circumstances in *Fermor*'s case, in 44 El. This being a point of great importance, highly concerning the common conveyance and assurance of estates. The Lord Keeper referred the consideration of it to the Chief Justices *Popham* and *Anderson*, who thought it advisable to take the opinion of all the judges upon it; and after two days' debate at Serjeant's Inn, it was held by all of them, except two, that the fine was no bar; and for this opinion they gave four reasons: 1st, They said, because stat. 4 Hen. 7. says that fines are for avoiding of strife; and covinous transactions like

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this by lessees, to the prejudice of their lessors, would be the cause of endless strife and debate. 2dly, Because it never could be intended by the makers of the act, that those who could not levy a fine should, by making a tortious estate, be thereby enabled to do it. 3dly, Because all acts, as well judicial as others, and which of themselves are just and lawful; yet, when mixed with fraud and deceit, are, in judgment of law, wrongful and illegal, and, therefore, a fine levied by covin shall not bind. 4thly, Because, by the demise for life, the lessee had so contrived it as to prevent the lessor of his remedy by entry or action, as he did not know of the demise, which did the wrong; and again, the lessee having lands of fee-simple in the same town, the presumption must be, that the fine related to them; and the lessee still continued in possession and payment of the rent. (3 Rep. 77.)

The notion, that levying a fine was such an act as amounted to an extinguishment of a proviso in a deed, gave occasion to the great debated point in *Lord Cromwell's* case, the circumstances of which were these. *A.*, seised in fee of a manor, with an advowson appendant, conveyed it by bargain and sale to *Andrews* in fee. By the same deed, *A.* covenanted that the manor should be recovered against him to the use of *Andrews* in fee, rendering 42*l.* rent in fee; and it was further covenanted, that a fine should be levied of the manor to *Andrews*, and that *Andrews* should render back the rent in fee, with *proviso* that *Andrews* should by deed give the advowson to *A.* during his life; and if it was not void in his life, then one turn to his executors. And it was further covenanted, that all other assurances to be made should be to the above uses. A recovery was suffered; and afterwards *A.* and *Andrews* levied a fine to one *Perkins* in fee, who rendered a rent of 42*l.* to *A.* in tail, with remainder over to another in fee, and rendered the manor to *Andrews* in fee. All this was found in a special verdict; and further, that the fine was not levied on a new consideration, but to the uses of the deed.

Further, *Andrews* did not grant the advowson in his life according to the deed, nor did *A.* request him; but after *Andrews*'s death, and the advowson became void, *A.* entered for the condition broken. And it was resolved by all the judges in the exchequer chamber, 1st, that this proviso was a condition; 2dly, that by the recovery *Andrews* had the land, and *A.* the rent by force of stat. 27 Hen. 8. and that the fine levied by *A.* and *Andrews* to *Perkins* did not extinguish the condition; for it was declared in the deed, that all assurances should be to the uses in the deed, among which the fine levied to *Perkins* is one; and the use and intent of the deed was, that the proviso should remain, and that the estate of *Andrews* should be subject to it; and, therefore, the fine was so directed by the general covenant, as to have a special operation, according to the intent of the parties; namely, that the condition should be saved, but the right and title to the manor extinguished. (2 Rep. 73.) And this construction was to take place, because fines and recoveries are common assurances, and always to be governed by the agreement and covenants of the parties; and therefore, as well as in some other cases, the saving need not be in the same record or fine, which entirely answered the objection, that land being conveyed by the fine, the saving which was in the covenant could not preserve the condition; and this was supported by the authority of many cases. Another reason was, because the bargain and sale, the recovery and the fine, though made, suffered, and levied at different times, constituted the same conveyance, agreement, and assurance.

The next objection was, that the fine being on grant and rendre, imports a consideration in itself, and therefore cannot be averred by parol to be to a use, though it might by deed; and the finding of the jury was not material. And as *Perkins* had the land by fine, his estate ought not to be affected by a deed made between *A.* and *Andrews*, to which he was not a party. And to enforce this objection, many reasons were urged, as that the general covenant should

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not direct the use of a fine levied upon a new consideration and agreement which this fine does; because he rendered the land to one and a rent to the other; because he was a stranger; because the rent is in tail, and by the covenant it was to be in fee. But to all this it was answered and resolved, that where there was such a difference between a fine *per grant and rendre* and an agreement, it might be set right by parol; that *Perkins* had no power to limit a use, but was a mere instrument; that although the estate of the rent was altered, the jury had found there was no new agreement, but that the fine was to the use of the deed. So that the fine was clearly held not to extinguish the condition, but to be to the use of the deed: and then, 4th, they all resolved, that by the death of *Andrews* the proviso or condition was broken, and therefore the entry lawful. (2 Rep. 73.)

A fine might be so levied by tenant for life as to be no forfeiture of his estate; as in *Breedon's* case, where tenant for life with several remainders over in tail, and the tenant for life and the first remainder-man join in levying a fine to one in fee, who renders back a rent-charge to the tenant for life. The first remainder-man died without issue; the second remainder-man entered, and the tenant for life distrained and avowed for the rent: and it was resolved by all the court of Common Pleas, that the fine was no discontinuance either of the first or second remainder, because each of the parties to the fine gave that which he had a right to give; that is, the tenant for life gave his estate, and he in remainder a fee-simple determinable on his estate-tail: and as the tenant for life gave what he had a right to give, the law will not construe it a forfeiture. The rent, therefore, was held to remain after the death of the first remainder-man in tail. (40 El. 1 Rep. 76.)

Jointures.

That branch of the stat. 27 Hen. 8. which related to jointures began also now to be better understood. We have seen, that in many cases where a jointure was not made according to some or other of the descriptions in the act, it had been

attempted to recover dower, as if it was not barred; but the justices had laid it down for a rule, that any joint estate of freehold (except a fee-simple) to be held after the coverture was sufficient to satisfy the statute, *vid. ant.* The court went now still further: a father, upon the intended marriage of his son, made a feoffment to the use of the intended wife (naming her) for life. This was *Ashton*'s case, in 6 Eliz. It was thought that this settlement, being made not by the husband, nor of his land, and before marriage, was not a bar, and therefore the widow brought a writ of dower; but the above objections were overruled. 6 El. Dyer, 228. 46. But, on a subsequent occasion, where Sir *Morris Dennis* had covenanted to stand seised to the use of himself and his heirs till marriage, and after marriage to the use of himself and the said Elizabeth (to whom he was to be married), and on a writ of dower, it became a question whether this (with an averment that it was for a jointure) should be a bar, the justices were divided; for *Catline*, *Saunders*, and *Dyer* thought that it was an estate within the equity of the statute, and the third proviso, which speaks of a jointure *pro termino vitæ*, or otherwise. And *Browne* and *Whiddon* were of a different opinion. 8 Eliz. Dyer, 248. 78.

Thus stood the law on this subject when *Fermor*'s case came before the court of common pleas in 14 Eliz. The decision in this cause has since been looked up to as a leading authority, which is more to be attributed to the full manner in which it is treated by the reporter, than that any great accession was thereby acquired to the construction of the statute. A feoffment had there been made to the use of the feoffor for life, with remainder to his wife for life, and remainder over: upon a writ of dower, this matter was pleaded in bar; to which the widow replied, that the above estate made to her on condition she should perform his will, and she prayed the judgment of the court whether the tenant should be received to aver that the estate was made for a jointure; and, upon demurrer, it was resolved, first, that a limitation in remainder to the wife was within the

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intent of the statute, and that it was not less so for being on condition; for it is still an estate for life, as required by the statute, and the condition to perform her husband's will though a consideration; yet it might very well be averred to be for a jointure, as one consideration would stand with the other; and all this was adjudged by *Dyer*, *Monson*, and *Manwood* against Harper, as appears from Dyer, 317. 7.; for Lord Coke speaks as if the court was unanimous. These were the principal points decided in this case, being such upon which the cause rested; but the subject of jointures was very fully considered, and some other points were resolved, as preparatory to found or illustrate the principal points, in the course of which the foregoing cases were reconsidered, and the judgments there given were accounted for upon principle.

They said, that the five estates mentioned in the act are only put for examples, and not to exclude any others which are within the meaning of the makers of the act, and an estate in remainder to the wife was as beneficial as one to her husband and her for life. All that was required was that the estate should be limited in its creation to take effect immediately after the husband's death; which seems plainly pointed out by the examples given in the act; and no estate should be taken by the equity of the act, which did not give the same benefit to the wife as all those do. And it was upon this principle, they said, the cases of the *Duchess of Somerset* and *Ashton* before mentioned were determined. And upon the same principle they held, that a feoffment to the use of the feoffor for life, remainder to the use of *B.* for life, and afterwards to the use of the feoffor's wife for life, for a jointure, it would not be within the statute, even though *B.* died before the feoffor. And they defined a jointure to be a competent livelihood of freehold for the wife, to take effect immediately after the death of the husband, for the life of the wife, if she is not the cause of the determination or forfeiture of it.

It was said by Lord Dyer, that the averment of the estate

being for a jointure, though against the express condition, was justified by the case of *Bitters* and *Beaumont*, 4 & 5 P. & M. Dyer, 146., which was not so strong a case as the present; for the averment is given by stat. 27 Hen. 8. by the words, "*for the jointure of the wife.*" And he denied the case in Brook, *vid. ant.*, where it is said to have been held, that a fee-simple was no jointure, which might perhaps be true under stat. 11 Hen. 7., but is certainly a good jointure according to the above definition, and clearly within the equity of the act, and the words also; for the act says, an estate for life, *or otherwise*, which surely takes in a fee-simple.

One of the points which branched out of this case, and which the court resolved, was, that a widow cannot waive a jointure granted *before* marriage; and they thought was plainly implied by the proviso in the act, which allowed a wife to refuse a jointure made *after* marriage. And it was said that land given *in part* of a jointure, or part of dower, shall not be construed a bar, but shall be held together with the dower.

After Lord Dyer had concurred in the judgment given in *Vernon's* case, and has so recorded it in his own report, we are astonished to find, two years after, that he declared himself of a different opinion; for he says of himself, that he thought an estate for life to a wife, after the death of a husband, could not be termed or construed a jointure, for two causes; first, she ought to take an estate jointly with her husband, according to the etymology of the word; secondly, stat. Ric. 2. c. 6. stat. 11 Hen. 7. c. 20. stat. 27 Hen. 8. c. 10. make no mention of such estates, but invariably speak of a joint estate. But this opinion is accompanied with a quære, 17 El. Dyer, 340. 50.; and the doctrine of Vernon's case seems to have continued in full force.

Devises by will.

The opinion of the justices in the time of Edw. 6., that a devise by will is no bar of dower, but a benevolence, and not a jointure, deserves some consideration. It was adjudged in 38 El., in *Leah* v. *Randall*, in the court of wards,

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4 Rep. 4., that in a devise for life to a wife, generally, it cannot be averred to be for a jointure. First, because a devise implies a consideration in itself, and therefore cannot be averred to be for any other use than is expressed in the will, and shall be taken as a benevolence, according to the case above mentioned. Secondly, by the stat. 32 & 34 Hen. 8., the whole will ought to be in writing, therefore no averment can be received against the express written words. But they resolved, that a devise may be made for a jointure; for as an estate made before the marriage had been held, by former decisions, to be good within the equity of the act, so shall a devise which is to take effect after the dissolution of the marriage by death. And this is one of the cases where an act under the authority of a latter statute shall be taken within the equity of a former; for a devise was not lawful till stat. 32 Hen. 8., which was five years after the statute of uses and jointures. Vernon's case, 4 Rep. 1.

Devises of land.

A devise attended with the following circumstances, occasioned a judicial decision upon three very material points. A man devised land to *B.* and his heirs; after that he purchased other lands, and then *B.* died; then the devisor said to the heir of *B.* that he should be *his* heir, and should have all the lands which *B.* was to have had by the will, if he had survived. And it was debated, 1st, Whether the newly-purchased lands did not pass by the will; 2dly, Whether by the death of *B.* in the lifetime of the devisor the heir took nothing; and, 3dly, Whether the verbal declaration of the devisor was not sufficient to give him the land. All the justices concurred in the negative of these propositions, except that *Walsh* differed from them in the principal one, which was the second. This was the case of *Brett* v. *Rigden* in 10 Eliz., and as it was a determination of some importance (particularly the second point), the arguments on both sides are worth remembrance.

It was argued in support of the first, that a will is of no force or effect till the death of the testator, and, therefore, it ought to be construed as if spoken at the last instant of

the testator's life; and then the gift of *all* his lands must, to have its proper construction, be taken to mean *all* he had at the time of his death. It was upon this idea, they said, that if a tenancy escheats after a devise of a manor, and before the devisor's death, it passes by the will. Again, if a will of land was made by a feme sole, who afterwards married, but survived her husband, and then died, this will would be good, because it was so at her death; and if it was considered from the date it ought to be countermanded by the intermarriage. The words were so general, that it was plain the testator meant there should be no exception; and they said, if a man devised all his plate, and then bought more, and so died, the devisee should have all he died worth on account of the largeness of the words.

On the other side, the justices said, the intent was the principle that was always to govern in the construction of wills; and here when he made his will, his intent was the devisee should have the land of which he was then seised, and it could not be his intent to give what he had not; neither had he purchased the new land when he made the publication; and when the will was consummated by his death, that consummation must be consonant to and in pursuance of the commencement, for to make the consummation differ from the intent at the commencement, they said, would be incongruous, and not like an act of discretion, therefore the intent at the time of making and of publication should govern; and that the commencement of wills was to govern was proved by this, that if a feme covert devised land by custom, and then her husband died, and then she died, the devise would be void. So of an infant who dies of full age. So if there was a grant of all lands held by *T. S.*, and afterwards the grantor purchases new lands held by *T. S.*, they would not pass; but they admitted, in the present case, if there had been a new publication of the will after the purchase, it would have been sufficient. To all which it was added by the Lord *Dyer*,

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that by stat. 34 & 35 Hen. 8. the devisor must be *seised at the time of the will.*

In support of the second point, it was urged, that the testator, by devising to *B.* and his heirs, certainly meant the heir should take. And though he might mean that he should take mediately by descent, and not immediately, yet the effect being that he should have some estate, and the mode of estate being only the form, it would be strange to say because he cannot take it in the precise form, that therefore the substance and effect of the will should be disappointed by adjudging that he should take nothing. As in a devise to the wife of *T. S.*; if *T. S.* dies, and she marries some one else, yet she shall take, because the effect was that she should have an estate, and it was accidental whether she was at the time the wife of *T. S.*, or of any other. Again, a devise to *A. B.* dean of St. Paul's, and the chapter and their successors, though *A. B.* dies, yet the land shall vest in the new dean and chapter. For the intent was that the chapter and their successor should be benefited, and *A. B.* was no particular cause of the gift; so here the intent was that the heirs of *B.* should have the land for ever, and he himself was only one of the causes of the gift. It was a rule that conditions should be performed according to their intent, and that would be sufficient in law, though the words were not exactly pursued, and *à fortiori* should it be in wills. Thus, in 21 Ric. 2. land was devised for life, remainder to the church of St. Andrew, and when it was said that the church was not *persona capax*, yet the devise was adjudged good to the parson, who, though not named, was comprehended in it.

But all the justices, except *Walsh*, argued that it was a principle in law, that in all gifts, whether by devise or otherwise, there must be a donee *in esse* capable to take the thing, when it ought to vest; and here, as the thing was not to vest till the death of the testator, *B.* was not then *in esse.* They said, the heirs were not named to take immediately,

but only to express the quantity of estate which *B.* should have, for he could not properly be made tenant in fee, without naming his heirs. It was, therefore, in favour of *B.* that the heirs were mentioned, in order to give *B.* that ample and complete estate which he might dispose of as he pleased. They said, that to argue that the heir should take it, notwithstanding *B.* died in the life of the testator, naturally led to this, that if *B.* had died without heir, the lord should have it by escheat, and that the wife of *B.* should be endowed; which, and some other conclusions, are too absurd to be sought for, though they follow from the same reasoning. And in cases of chattels, it might with the same reason be said, where a lease or goods are devised, and the devisee dies in the life of the testator, that they should vest in the executor of the devisee. Therefore, they said, such things as would follow by conclusion if the estate had vested, are not good causes to make an estate vest in others than the precise person to whom they were limited. These were the reasons upon which the justices determined this point; but *Walsh* neither adopted the reasons or concurred in the judgment, and as his reasons are not given, we must suppose he concurred in some or all of those which we before gave as the argument of counsel on that side.

The justices were unanimous upon the third point, as they first were upon the first. This opinion thus rested upon the stat. 32 & 34 Hen. 8., which requires every will of land to be in writing; and, therefore, the verbal declaration made to the heir could not amount to any devise. Plowd. 341.

These were the resolutions, and this the state of opinions on this subject, when *Corbet*'s case came before the court of Common Pleas in 42 El.; and there it was resolved by the whole court, that a proviso to cease an estate tail, as if the tenant in tail were dead, was repugnant, impossible, and against law, for the death of tenant in tail was no *cesser*, but only his death without issue. Therefore, the present

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is like a limitation for an estate tail to cease, as if the tenant in tail had granted a rent charge, or made a lease, or done any other thing, which was, in truth, no *cesser* of the estate. The judges gave their opinions severally upon this case; the Lord *Anderson* relied upon the cases of *Germain* v. *Arscot*, which being in case of a will was stronger than the present, as such instruments always receive a favourable construction; the other was *Cholmley* v. *Humble*, which was a use, like the present; and it was clearly held in that case, and so laid down in the present, that no limitation could be made of a use, since stat. 27 Hen. 8., which could not be made of a state in possession. *Walmesley* agreed, that an estate, or part of it, could not be determined as to one, and continued as to another; but he said it might be defeated wholly by condition, or limitation; and in this case as the donor wanted the estate tail to cease as to one, and be continued as to another, during the life of the tenant in tail, it was therefore repugnant, and equally void, with a feoffment in fee to the use of *A.* and his heirs every Monday; to the use of *B.* and his heirs every Tuesday, and so on; these being fractions of estates which the law will not allow. And though an act of parliament, or the common law, might make an estate cease as to one person and continue as to another, yet no person should do it by his deed; and he gave some instances of such estates at common law. *Glanville* said, no such proviso as the present had been seen between the time of the stat. *de donis* and of uses, and, therefore, it should be concluded, that such estates were not allowable by law, though he quoted the settlements made by Justice *Richil* and Chief Justice *Kirning*, mentioned by *Littleton*, and held, at that time, not to be legal limitations. 1 Rep. 84.

It is remarkable, that in this case no notice whatever is taken of the decision in *Plowden*; and it is still more remarkable, that in the following year a similar proviso being brought in question in the case of *Mildway* v. *Mildway* in the same court, it was held by *Walmesley* and *Warburton*

(who had succeeded *Glanville*) to be good, against *Anderson* and *Kingsmill*, who adhered to their former opinion. *Warburton* maintained that the proviso was not repugnant, and argued, that the possession given to the use by stat. 27 Hen. 8., should cease without claim or entry, as the use itself might before the statute; so that by *the going about*, &c. (which was an issuable matter), the estate ceased. And as to the supposed repugnancy of the words, *as if he were naturally dead, and not otherwise*, he said, these were only of abundance and surplusage; and the sentence must be construed, as it lawfully might, namely, that the estate tail should cease during his life, and should afterwards arise in his issue, which was neither repugnant nor inconvenient. In answer to *Corbet*'s case, he said it was only a feigned case, and ought not to bind the conscience of any judge. As to *Germain* v. *Arscot*, he said, that was of a possession, and not of a use, as this is; and that *Cholmley* v. *Humble* differed from this, but he did not show how it differed. *Walmesley* agreed with him, that the use might cease without entry or claim; and further, that the condition was not repugnant, and confessed that he had given a doubtful opinion in *Corbet*'s case; but now, upon better advice and deliberation, he was of opinion, that it was not repugnant, but that the estate tail might well cease during all the life of the tenant, and again revive in his issue. *Anderson* and *Kingsmill* insisted wholly on the reasons in *Corbet*'s case, and that uses were not to be compared to devises; and that uses could not cease in possession without claim or entry. Moore, 632. What afterwards became of this case does not appear.

Such were the chances and such the fate of this *vexata questio*, which was agitated and determined in both the King's Bench and Common Pleas, sometimes one way and sometimes another. The idea upon which these limitations were made and taken up by the courts, was that of *perpetuities*; the whole consideration of which was a struggle between the rules of law and public expediency. Those

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who were for supporting such provisoes, and *perpetuating* the limitation of estates in the way they had been originally disposed, founded on the distinction between gifts to a use and by will, and gifts in possession by deed. It was, seemingly, admitted on all hands, that gifts at common law could not be limited under conditions like this; and when it is considered that uses, since the statute, were mere estates in possession, it only remained to avail one's self of the great indulgence the law allowed to wills in order to effectuate the testator's intention in the manner he had expressed it: and if we weigh every inference that may be drawn from the foregoing decisions, we shall perhaps find, after all, that such proviso in wills, at least, were not thought illegal, for none of the above cases, except *Germain* v. *Arscot*, were upon a will, and there, it is true, the judgment was against the proviso: yet, there are these authorities the other way; there is the unanimous decision in *Scholastica*'s case, in Plowden; there is *Sharrington* v. *Minors* upon the identically same proviso, determined many years afterwards by a different set of judges, though with the dissent of *Popham*; so that both the King's Bench and Common Pleas decided this question; and the decision in *Scholastica*'s case is not observed upon or denied in any of the subsequent decisions that went the other way, so that it is probable many assented to the declaration of *Dyer* in that determination, that a man's will was as an act of parliament for the ordering of his property. This may be urged to show, that whatever opinion might be entertained about such a proviso in other cases, it was not thought so evidently illegal in a will; and when to this is added the declaration of *Walmesley* in the last case, and the equal division of the judges, notwithstanding former decisions, we are quite at a loss to say what was the governing opinion at the close of this reign upon these provisoes, whether in a deed or a will. This point, therefore, was left for further discussion in after times.

A remainder of a term for years was another point in

the law of devises that had created much discussion: two cases of this sort happened nearly together in the 20th year of the queen, in which this matter, after some consideration, became to be better understood. These were *Welsden* v. *Elkington*, in the Common Pleas; and *Paramour* v. *Yardley*, in the King's Bench.

In the former of these, the testator, having a term of sixty years, willed that his wife should have and occupy the land, for so many of the years as she should live; and after her decease, he bequeathed the residue of the years of the lease unexpired to his younger son; and he made his wife executrix. After his death the widow entered; and then the son dying, and the widow, after having sold the term, dying also, the administrator of the son claimed the remainder of the term.

Upon the argument of this question, it was strongly endeavoured to prove the devise over to be unsupported by law; but it was held by all the court, that the remainder was good. For they said, that by circumlocution the lease was here given to the widow for her life; that is, should have the whole of the lease if she lived so long: and if she died during the lease, that the son should have it during the residue of the years. And it was the business of the court so to marshal the words as the construction may give effect to the intent. Then, suppose the son's estate had been expressed first, and then the wife's; as if it had been to the son from the death of the wife unto the end of the term, and then he had further devised the land to his wife for life: this form of words would have served both the wife and son, and would have been warranted by law. Now, they said, the present devise was this in substance and words; and the court must adjudge which part of the sentence comes first. As if a devise was made in fee to B., and afterwards in the latter part of the will, a rent charge was given out of the land to D., here, though the rent came last, and might seem repugnant, yet it was good; and it was the office of the court to marshal the words and

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make the two sentences stand together. And it was said, there was a similar case to the present in the King's Bench, meaning that of *Paramour* v. *Yardley*, which they stated, and the reader will see more at length presently. And this indulgent construction of the words, they said, was dictated by the principle on which all wills were expounded: to prove which, they cited many adjudged cases, which were then leading authorities, and some of which have been mentioned before.

In answer to the objection, that the estate limited to the son was uncertain, because the wife might outlive the term, and therefore the devise should be void for this uncertainty, they said, this was a certainty upon an uncertainty, which was no uncommon thing in contracts, as a lease habendum from the death of *T. S.* to such a time would, it is true, be void, if *T. S.* lived beyond that time, but otherwise would be good. Again, a devise of so many years of a term as *T. S.* shall name, is good; if *T. S.* names any otherwise, is void. And here, by the death of the widow, the estate limited to the son was made good; though it was at first uncertain whether he would have any at all. Again, in answer to another objection, which was, that the wife had only the occupation and no part of the term, and therefore her occupation was no execution of the *term* to the son, that being a distinct thing (a point much laboured on the other side), Lord *Dyer* said it was not so; for the interest to the son and to the wife was of one and the same thing; namely, the land for a devise to occupy is a gift of the land, and she had *jus possessionis*. And, therefore, the execution of the legacy in the wife was an execution to the son also, it being one and the same term, and the wife might be said to have the whole term, but *sub modo*. Her claim as legatee ought to be adjudged a good execution of the term, as well to the son as to her, for no other assent could be had to the estate of the son in the life of the wife. They said, the limitation to the son was not a possibility, as *Popham* called it, but a devise of the land itself. (20 Eliz. Plowd. 522.)

Therefore they all agreed that the administratrix of the son should have the land.

The case of *Paramour* v. *Yardley*, which was determined just at the same crisis in the king's bench, was as follows: — A lessee for years devises his term to his son (with certain limitations that make no part of the question then litigated), with remainders over; and then adds, that his will was, that his wife should have the occupation and profits of his lease until his son came to the age of twenty-one years. She sells the term, and the son at his full age enters. In this case it was objected, that the lease being given to the son, the latter devise to the wife should be void for the repugnancy; and then her entry by force of the devise was only as executrix, in which case her occupation as executrix could be no execution of the legacy to the son; from which they inferred, that the grant of the term by the widow would bind the son.

But it was argued here, as in the former case, that the law should marshal these clauses so as to give them coherence and effect, and the same cases and the same reasoning was gone over as before; to all which the court assented. Again, when it was urged that the devise of the occupations and profits was not a devise of the land, the like was given, though somewhat more fully, as in the former case. When these two points were determined, 1st, that it was a good devise to the wife, 2dly, that it was a devise of the land, there remained the third and principal part of the objection to the plaintiff's claim, namely, that the wife being executrix and legatee when she entered, it must be taken of course that she entered as executrix; and if she would have it as legatee, she ought to do some act that would prove she accepted it as a legacy; and if she does not that, but on the contrary does some act as executrix, such act will manifest her intent, and be a disagreement to the legacy from the beginning; and they said her grant of the whole term was such an act, for she could not assume such right but as executrix. They thought another good reason why she should be said to have any

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part of the term as legatee was, because it was found by the jury that 100*l.*, owing by the testator, was unpaid; and also by the will, that several sums were devised; and as it must be intended they were not paid, she might alien the whole term to pay them; and this, they said, was another cause to delay the execution of the legacy. A third reason was, that she was by the will entrusted with the education of the children, and the occupation and profits were devised to her for that purpose; and the education of the children is rather a legacy to them than to her: and the principal intent of the testator in his devise to his wife was to see his will performed, which purpose is not sufficient to make it a legacy to the wife; for a gift of goods to an executor, to see his will performed, is no devise, it being what the law of itself would give.

In answer to this, it was argued and agreed by the whole court, that the term given to the wife ought to be adjudged executed in her, and the remainder in the son: for if it had been devised to a stranger, he might have sued the executor in the spiritual court; but when made to the executor, as he cannot sue himself, it shall be adjudged in him by operation of law like a remitter. And as it was better for the wife to have it to her own use during the minority than to the use of the testator, the law will construe it to be in her as a legacy. Again, by her accepting the duty of the testament, she has assumed to pay legacies; and as the devise to her was a legacy, she has, in law, accepted the term as a legacy, merely by accepting the executorship; for the law, before any thing done one way or other, gave judgment, that she had the term as a legacy, and not to the use of the testator: though it was admitted that she might signify her disagreement, but till then it was to be construed as a legacy. Now, in this case, as she had educated the children, and so performed the charge annexed to the legacy, this showed her assent to take it as a legacy; and the grant afterwards was an argument of her inconstancy, and did not invalidate the election she had before made.

As to the debts, they said, that was answered by the special verdict, which had found that she had sufficient assets besides the lease; and this legacy ought to be paid as well as the debts. Suppose the legatee was a third person, the executor, who had assets besides, could not sell the lease; no more could the executrix in this case. And this being the devise of a specific thing, must be performed according to the devise; though it would be otherwise if a sum of money was left: for then she might sell what property she pleased, so as the sum was paid; and they said, if the wife in this case had disagreed to the devise, that would not have defeated the devise to the son, for he would have had the devise presently. And the same reasoning and answer might more forcibly be given to the objection, that the other legacies were not paid: so that the execution of the term, which was also a legacy and a specific one, should not be delayed on account of their non-payment; though in the present case it did not appear by the verdict but that they really were.

To the other objection, that the devise being to the executor to perform his will, was no more than the executor should have done without the devise, and so it was void. They said there was another cause of the devise, namely, the education of the children, which is not a thing testamentary, nor a legacy to the issue, but it is an intent annexed to the devise made to the wife; and as only a part of the lease was given, it is a different disposition from that the law would have made: for as a devise in fee-simple to the heir is void, so a devise in tail, or any less estate, is good, because it differs from that which the law would give him. So that none of the objections were sufficient causes to prevent the execution of the legacy to the wife.

Further, they considered the devise to the wife and son as one legacy, though the estates were several; and, therefore, the execution of the wife's legacy was an execution of the remainder to the son. As a reversion granted for life-remainder in fee, if the particular tenant attorns to the

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tenant for life, this enures to him in remainder; for if the first devise had been to a stranger, with remainder to the son, and she had assented to the first devise, this would enure to the son; and the present case is the same in effect. Therefore, they held the son's entry after the death of the wife to be lawful. (Plowd. 539.)

Executors and administrators.

A practice had obtained for persons who were entitled to have the administration of intestate's goods, to procure it to be granted to some stranger of mean circumstances, from whom they would take deeds of gifts and letters of attorney by means of which they obtained possession of the effects, and yet were not subject to pay debts; and the administrator in the mean time could not be found, or if he could, was not of ability to satisfy out of his own goods the devastation he had committed of the intestate's by the above proceeding. It was therefore endeavoured to remedy this by stat. 43 El. c. 8. which enacts, that every person who shall receive any goods or debts of an intestate, or a release or other discharge of a debt or duty upon any fraudulent intent like that above mentioned, without such valuable consideration as shall nearly amount to the value thereof, shall be charged as executor of his own wrong as far as such goods, debts, or release will satisfy, deducting for himself an allowance of all just debts owing to him, upon consideration without fraud, and all payments which lawful administrators or executors ought to make.

In the case of *Graysbrook* v. *Fox*, the nature of administration and the authority of executors were much discussed. There a person had made a will and appointed executors, and died: the ordinary, before probate, commits administration to *T. S.*, who sells certain goods; afterwards the executor proves the will, and brings detinue against the vendee. And it was held by *Walsh*, and *Dyer* chief justice, in favour of the plaintiff, and *Brown* afterwards signified his concurrence; but *Weston* was of opinion for the defendant.

Weston seemed to argue from the great sway the ordi-

nary had at common law in these matters, the goods of an intestate being to be disposed *in pios usus*, as he should direct, without being liable to the demands of the intestate's creditors. And so it continued, till, by stat. Westm. 2. c. 19., he was made liable to such suits as executors before were liable to. But, because the ordinary had no power to bring actions, it was further enacted by stat. 31 Edw. 3. c. 11., that he should appoint the most lawful friend of the deceased to administer, and to bring and defend suits as an executor: and he said the ordinary might, before this act, have committed administration, as a part of his authority to dispose; and such committees might be sued by equity of stat. Westm. 2.; so that the power to recover seems the only purview of the act. The administrator's power over the goods is a very ancient common law authority, so as to sell and dispose as he pleased. And, in this case, he thought the sale good; because, in the pleading, it is declared that the ordinary had notice of the testament. And if the executor secretes, or keeps back the testament, the commission of the ordinary is regular, and of necessity, that the goods may be taken care of; and he is not bound to enquire after the testament. The executor is not to avail himself of his own silence by avoiding the sale made by the administrator. He said, that where executors refuse, or afterwards die intestate, these were cases not within the act, and yet it was usual to grant administration; because the intent of the act was, that where no executors were to intermeddle, there an administrator should be appointed. And that is precisely the state here; namely, that where there is a mesne time, in which the executors cannot or will not execute the testament, the ordinary may commit administration, and his acts shall stand with the intent of the statute, and not be invalidated.

On the contrary, it was argued by the Lords *Dyer* and *Walsh* to this effect. They said, that the defendant not having averred the deceased died intestate, it ought to be

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taken as a confession that a will was made; and the ordinary has no authority unless it was an intestacy. Now the executors are so immediately upon the death, and before the probate, which is but a confirmation and allowance of what the testator had done, and the property of the goods is vested in them; for they may be sued, may alien, and give away before probate; and if so, the law never vests it in the ordinary, and of course not in the administrator: and if there was any doubt of this, it is removed by the probate, which has relation to the death. And he quoted a case in 7 Ed. 4., where *Littleton* said, If a man is made executor without knowing it, the ordinary might well commit administration in the mean time; but presently, by the probate, the power of the administrator is determined. (7 Ed. 4. c. 12, 13.) And they said, it appeared by 4 Hen. 7., that in a case like this, the ordinary ought to have awarded against the executor to come in, and if he would not prove the will, then he might commit administration to others. (4 Hen. 7. c. 13.) But here there is no such caution; and for that reason the probate disproves the administration, not from the time of the probate only, but for the whole of the time. And, therefore, they said, this case was not at all like that of refusal, and others put by *Weston*; for here there was no intermediate time. It was allowed, in the present case, if the sale had been shown by the defendant to have been made by the administrator in discharge of any thing which he had been compellable to do, it should not have been avoided; but no such matter being shown, they held the sale void, and that the executor should recover the thing sold. (7 Eliz. Plowd. 276.)

Usury.

The stat. 37 Hen. 8. c. 9. against usury had been repealed by stat. 5 & 6 Ed. 6. c. 20., since which this mischievous practice had considerably increased. The statute of Henry the Eighth was therefore revived by stat. 13 El. c. 8., and it was thereby, moreover, enacted, that all bonds, contracts, and assurances, collateral or other, for payment of principal, or covenant to be performed for any usury in

lending or doing any thing against that act, where above 10*l. per cent. per annum* was reserved or taken, shall be void, sect. 3. And because, says the statute, *all usury*, being forbidden by the law of God, *is sin, and detestable*; it therefore further enacts, that *all* usury, loan, and forbearing of money, or giving days for forbearing of money, by way of loan, chevisance, shifts, sale of wares, contract, or *other doings* whatsoever for gain, mentioned in that act of Henry the Eighth, whereupon *is not referred or taken* above 10*l. per cent.* for one year, or after that rate, for a greater or less sum, is to be punished by the offender forfeiting *so much as shall be reserved by way of usury above the principal*, sect. 5. Thus was all interest for money disallowed, and that above 10*l.* severely punished; for, besides the penalty on the principals, all brokers, solicitors, and drivers of bargains for contracts, or *other doings* against the statute of Henry the Eighth, are to be judged as counsellors, attornies, or advocates in any case of *præmunire*, sect. 5.; and the principal offenders are also to be corrected according to the ecclesiastical laws, sect. 9. Justices of oyer and terminer, of assize, and of the peace in sessions, mayors, sheriffs, and bailiffs of cities, may determine offences against the statute of Henry the Eighth, sect. 6. So much was the legislature sharpened against these practices as to put the cognizance of them in the hands of inferior magistrates, as though they were matters which concerned the very police.

Stolen horses.

The provisions of stat. 2 & 3 Ph. & M. c. 7. concerning stolen horses were carried farther by stat. 31 El. c. 12. It is by this act required, that the toll-taker or book-keeper shall take upon him perfect knowledge of the person who sells a horse; or else, the person so selling is to bring a sufficient and credible person, who will testify that he knows him, his name, and place of abode; all which, together with the name of such witness, and the true price given for the horse, to be entered in a book; a note of which entry is to be given to the buyer, under pain, both

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to the book-keeper, the seller, and witness neglecting the above directions, or giving untrue testimony, of 5*l.*; and the sale to be void. The justices in sessions to have cognizance of these offences. Notwithstanding a sale according to all the above circumstances, an owner may within six months make claim before the mayor or head officer of the town, or before a justice of the peace near the place, where the horse may then be found; and if he proves within forty days, by two witnesses, that the horse is his, and was stolen, he may take it, upon paying so much money as the then possessor will swear before such head officer or justice he *bonâ fide* paid for it.

Before we enter upon such statutes as made alterations in the ordinary administration of justice, it will be proper to mention some provisions made for determining questions upon policies of insurance. When controversies had arisen upon these mercantile contracts, they had from time to time been ordered by some grave and discreet merchants appointed by the lord mayor, as persons whose experience better enable them to judge of such matters; but it seems, that of late this course had not been generally liked, and suits used to be commenced in the courts of law against every several insurer, which caused great charge and delay to the parties, sect. 1. It was therefore thought proper to devise some method of deciding these questions more conveniently for all persons interested. A way was marked out by stat. 43 El. c. 12. which empowers the chancellor to award a standing commission, to be renewed yearly at the least, for determining causes upon such policies of insurance as shall be entered in the office of assurance in the city of London; which commission is to be directed to the judge of the admiralty, the recorder of London, two doctors of the civil law, two common lawyers, and eight grave and discreet merchants, or any five of them, who are to examine these matters in a brief and summary course, as they in their discretion shall think meet, without formalities of pleadings or proceedings.

They may warn parties to come before them, examine witnesses upon oath, and commit to prison such as disobey their final orders or decrees. They are to sit at least once a week in the office of assurance or other public place which they shall appoint. There is an appeal to the chancellor by bill; no commissioner (except the judge of the admiralty and the recorder) is to act without taking an oath before the lord mayor and court of aldermen, to proceed indifferently between the parties.

In reviewing the statutes made respecting the administration of justice, we shall first speak of those which made any change in courts; and next those which regard the process and proceeding in action.

Heretofore all issues joined in the courts at Westminster, and triable in the county of Middlesex, had been usually tried at bar; and many trifling actions had on that account been brought in the county of Middlesex, in order to obtain a speedy trial. This occasioned great hinderance to the business of importance depending there on demurrer or otherwise; and also imposed an additional weight of duty and attendance on the freeholders who were to try issues there. For these reasons it was enacted by stat. 18 El. c. 12., that thenceforward the chiefs of the three courts, or in their absence, two judges of the respective courts, as justices of *nisi prius* for the county of Middlesex, may try all issues which are triable by an inquest of that county in Westminster-hall within term-time, or within four days next after the end of every term (by 12 Geo. 1. c. 31. s. 1. within eight days after term); and commissions of *nisi prius* are to be awarded as in other cases.

Error in the Exchequer Chamber.

After this new court of *nisi prius* was erected, a new court of error for judgments passed in the King's Bench. This was by stat. 27 El. c. 8. which, complaining that errors there could only be reformed in parliament, and that was *not in these days so often held as in ancient times*; and besides that the great business of the nation took up so much of their time as not to allow sufficient leisure for

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such examinations, enacts as follows; where any judgment shall be given in the King's Bench in debt, detinue, covenant, account, action upon the case, *ejectione firmæ*, or trespass, *first commenced there* (which has been construed to signify actions *upon bill*), other than such where the queen is a party, the plaintiff or defendant against whom the judgment is, may, at his elections, sue out a special writ to be devised in Chancery, directed to the chief justice, commanding him to cause the record, and all things concerning the judgment, to be brought before the justices of the Common Pleas and barons of the Exchequer in the Exchequer Chamber, there to be examined by them (and barons being of the coif), or six of them at the least; and reversed or affirmed for errors, except only such as concern the jurisdiction of the King's Bench, or any want of form in a writ, return, plaint, bill, declaration, or other pleading, process, verdict, or proceeding. After which, the record is to be brought back to the King's Bench, that further proceeding, as execution, or the like, may be had. But such judgment in error is not to be so final as to preclude the party grieved from suing in parliament for further examination.

Afterwards there was an act made 31 El. c. 1. in aid of this, and of another, stat. 31 Ed. 3. st. 1. c. 12., which had erected a court of error in the Exchequer Chamber upon judgments passed in the Court of Exchequer. As to the first of these, in consideration that the chancellor and treasurer were great officers of state, and, owing to other weighty concerns, could not always be present in that court, and that writs of error were often on that account discontinued, it enacts, that such absence shall not be a discontinuance; but if both the chief justices, or either the chancellor *or* treasurer be present at the day of adjournment, the cause shall proceed, but no judgment is to be given, unless they are both present. As to the new court, in order to prevent the like discontinuances from a full number of the appointed judges not attending, it empowers

any three to award process, and prefix days for the continuance of writs of error; but, as in the former case, no judgment is to be given without a full court as appointed by the statute.

Removal of causes out of inferior courts.

The removal of causes out of inferior courts was put under some regulation by stat. 43 El. c. 5., which is entitled An act to prevent perjury and subornation of *perjury*, and unnecessary expences in suits at law. The meaning of the former part of which title will be best collected from the practice then common in those courts: a defendant would suffer the cause to go on till they were at issue, the jury sworn, and evidence given on the side of the plaintiff, and then would deliver into court a writ to remove the suit. The keeping back the writ in that manner not only put the party to unnecessary expence, but he thereby came to the knowledge of his proofs, and so obtained time to furnish himself with false witnesses to meet him at another trial, sect. 1. To remedy this, it is enacted, that no writ of *habeas corpus*, or any other sued out of a court of record at Westminster, to remove an action out of a court in any city, town corporate, or elsewhere, shall be received or allowed by the judge or officer, except it be delivered before the jury appear, and one of them is sworn, sect. 2.; altered by stat. 21 Ja. 1. c. 23.

Process and proceedings.

The statutes which made alterations in the process and proceedings of courts we shall consider, as nearly in the order in which they were made as is convenient. The first was made to enforce obedience to proceedings in the ecclesiastical courts; the stat. 5 El. c. 23. makes several provisions respecting the writ of *excommunicato capiendo*. The great defect in this writ was, that it was not returnable into any court which might judge of the due execution of it, but was left entirely to the discretion of the sheriffs and their deputies, through whose negligence it was sometimes not executed at all. It is, therefore, provided by this act, that it shall be made in term returnable in the King's Bench, and to have twenty days at least between the *teste* and

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return. The writ, when sealed, is to be forthwith brought into the King's Bench, and there opened in the presence of the judges, and delivered of record to the sheriff or his deputy. If the writ be not returned at the proper time, or there be any default or negligence in the execution of it, the sheriff is to be amerced at the discretion of the judges. The body of the party, if taken, is not to be brought into court, but the writ only to be returned, with a declaration of what has been done upon it.

If a *non inventus* is returned, the following process is ordained. A *capias* is to issue, returnable at least two months after the *teste*, with a proclamation, to be made ten days at least before the return, either in the county court, sessions, or assize, for the party to appear in six days: if he does not yield himself, he is to forfeit 10*l.* to the king; upon which another like *capias* and proclamation issues, and then a third, with the penalty of 20*l.* for not appearing, and so on *ad infinitum*. This process always to be in the county where he commonly resides. The party, if taken in this manner, is to remain in prison without bail, as if taken upon the *excommunicato capiendo*, reserving to the bishop still to accept submission and satisfaction, and to absolve and release the offender, signifying the same, as formerly, to the Court of Chancery. However, all the provisions of this act are restrained to the following cases: where there is a sufficient and lawful addition in the writ of *excomm. capiendo*, according to the statute of additions; and where it appears in the *significavit* that it is upon some cause or contempt, in matter of heresy; refusing to have his child baptized, or to receive the communion, or to come to divine service, or errors in the religion or doctrine now received in the church of England; incontinency, usury, simony, perjury in the ecclesiastical court, or idolatry.

It was endeavoured to prevent the vexation of suitors, by stat. 8 El. c. 2. It was common to arrest a person by *latitat*, *alias* or *pluries capias*, out of the King's Bench, and by like process out of the Marshalsea and other courts in

cities and other places, and after that exhibit no declaration; so that the defendant, after being put to charge and trouble, could have no costs awarded against the plaintiff for the vexation: it was, therefore, now enacted, that where any one shall be arrested, or appear upon the return of any of the above process out of the King's Bench, and shall put in bail, if the person suing do not, within three days next after such bail taken, put in a declaration, or if after declaration he do not prosecute the same with effect, but shall apparently and wilfully suffer his suit to be delayed, discontinued, or shall be nonsuit, then the judges shall, at their discretion, award the person so vexed his costs, damages, and charges. The same was enacted, sect. 3., with regard to suits in the Marshalsea and other inferior courts.

It is likewise provided, that where any one shall cause another to be arrested at the suit of a person who either did not exist, or did not agree to such proceeding, and shall thereof be convicted by indictment, presentment, or *by the testimony of two sufficient witnesses, or more*, or other due proof, he is to be imprisoned for every offence six months; and before he is discharged is to pay treble costs and damages to the party grieved, as well as 10*l.* to the party whose name he made use of. So that arresting persons merely from malice, without any cause of action, no longer enjoyed impunity.

The statute 3 & 4 Ed. 6. c. 4. concerning the exemplification, or *constat*, of letters patent, was, in all its parts, extended by stat. 13 Eliz. c. 6. to the letters patent of Henry the Eighth, Edward the Sixth, Queen Mary, King Philip and Queen Mary, Queen Elizabeth, her heirs and successors; so that it now became, so far, a general law. To avoid the great and chargeable delays often happening to tenants and defendants, it was enacted, by stat. 14 El. c. 9., that in all cases where the plaintiff or demandant is entitled by any statute to pray a *tales de circumstantibus*, all tenants, actors, avowants, and defendants, may, upon their refusal,

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demand it; and in *qui tam* actions the defendant shall be admitted to have a *tales*. Then follow the two statutes of jeofail, stat. 18 El. c. 14. & 27 El. c. 5., which we shall speak of presently. The next is stat. 29 El. c. 4. For regulating the fees of sheriffs and bailiffs of franchises or liberties in cases of execution, the many proclamations directed by stat. 4 Hen. 7. c. 24. to be made on fines in the Common Pleas had so much increased of late years, that the stat. 31 El. c. 2. says, it would take up sixteen days in every term to make proclamations upon all the fines there levied; when, on the other hand, the suits there had so much increased, that scarcely one day could be spared for proclaiming fines. That act, therefore, ordains, that fines shall be proclaimed only four times; once in the term wherein it is ingrossed, and once every of the three next terms.

This brings us to stat. 31 El. c. 3., which was made for avoiding of secret outlawries in personal actions, where the defendant has a known place of dwelling, owing to the proclamations being made in the county-court or quarter-sessions at a distance from their abode, and therefore giving them no convenient notice of suits against them; for remedy whereof, it is enacted by that statute, that in every personal action wherein an exigent is awarded, there shall issue one writ of proclamation having the same *teste* and return with the exigent, directed to the sheriff of the county where the defendant is then dwelling. Upon which there are to be three proclamations made; one in the county-court, one at the quarter-sessions, a third to be made one month at least before the *quinto exactus*, at or near the most usual door of the church of the place where the defendant dwelt at the time the exigent was awarded, upon a *Sunday*, immediately after divine service; and all outlawries not pronounced according to this statute are made void. As to real actions, it is ordained, that on every summons upon the land, at least fourteen days before the return thereof, proclamations of the summons are to be made on a Sunday in the above manner; and such pro-

clamations to be returned with the names of the summoners. And if this act is not complied with, there is to be no *grand cape*, but *alias* and *pluries* summons until proclamations are duly returned. And before the allowance of a writ of error, or reversing an outlawry by plea or otherwise, for want of proclamations as directed by this act, the defendant shall put in bail not only to appear and answer, in a new action to be commenced, but also to satisfy the condemnation, if the plaintiff begins his suit before the end of two terms after allowing the writ of error, or otherwise avoiding the outlawry, sect. 3. The same provision which had been made by stat. 1 Ed. 6. c. 10. for Wales and Chester, and by stat. 5 & 6 Ed. 6. c. 26. for the county palatine of Lancaster, was now made by stat. 31 El. c. 9. respecting the county palatine of Durham, as to awarding writs of *exigent* and proclamation. They are to be directed to the bishop of Durham, and during a vacancy to the chancellor of the bishopric or county palatine; who, by mandate, is to direct the sheriff to execute them.

Actions upon penal statutes.

Two very material statutes were made respecting actions upon penal statutes. The first is stat. 18 El. c. 5. "To redress disorders in common informers." It is thereby enacted, that no one shall sue another upon a penal statute but by way of information or original action. Upon every information, a special note is to be made of the day, month, and year of exhibiting it in the office; nor is any process to be sued out till the information is exhibited in form; and upon the process is to be indorsed the plaintiff's name, and the statute upon which it is grounded. Any clerk making out process contrary to these directions is to forfeit 40*s*., half to the queen and half to the party against whom the process is issued, sect. 1. No informer shall compound with a defendant but after answer made in court; nor then but by order or consent of the court. And if an informer delay his suit, or discontinue, or be nonsuit, or have a verdict or judgment against him, he shall pay costs, charges, and damages, to be recovered by *capias*, *fieri fa.*,

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or *elegit*, sect. 3. And if any (except the clerks for making out process) offend in suing out process, making of composition, or other misdemesnor, contrary to this act; or shall, by colour or pretence of process, or of any offence against a penal statute, make any composition, or take money, reward, or *promise of reward*, he is to stand in the pillory for two hours, be disabled to sue upon any popular or penal statute, and for every offence forfeit 10*l.*

The limitations of this statute are not to restrain informations for maintenance, champerty, buying of titles, or embracery; or where a penalty is *specially* limited to any particular person; nor is this statute to extend to such officers of record as by their office may exhibit informations, sect. 5, 6, 7.

Other restrictions were imposed on informers by stat. 31 El. c. 5., which enacts, that in an information the offence shall not be laid in any other county than where it was in truth committed; and a defendant may plead that the offence was not in the county where it was alleged, and if found for him, the plaintiff shall be barred of his action, sect. 2. There is the like exception of officers of records, informations for champerty, buying of titles, or extortion; actions upon two particular acts made for collecting the customs (1 El. c. 11. and 20.); and, in general, all informations for concealing or defrauding the customs, tonnage, poundage, subsidy, impost, or prisage; for corrupt usury, engrossing, or for regrating or forestalling, where the penalty is of the value of 20*l.* or above.

All actions, indictments, or informations for a forfeiture, when limited to the king, are to be brought within two years; when to the king, and any other who shall sue, within one year; and, in default of such suit, the king may sue within two years after that year ended. It then repeals stat. 7 Hen. 8. c. 3. concerning the time of bringing actions upon penal statutes, and confirms all others in force upon the subject of reforming disorders of common informers, sect. 1. 7. And it further directs, that all suits

upon any statute for using any unlawful games, or for not using any lawful game; for not having bows and arrows according to law; or for using any art or mystery, in which the party has not been brought up, according to stat. 5 El. c. 4. All these are to be sued in the general quarter-sessions, or assizes where the offence was committed, or in the leet, and not in anywise out of the county. (See stat. 21 Ja. 1. c. 4.)

Of jeofails.

The statutes of jeofail, before alluded to, contributed very much to expedite the pursuit of judicial redress. The first of them, stat. 18 El. c. 14., enacts, if any verdict of twelve men or more shall be given in any action, suit, bill, or demand, in a court of record, the judgment thereupon shall not be stayed or reversed by reason of any default in form, or lack of form touching false Latin, or variance from the register, or other defaults in form; in a writ original or judicial, count, declaration, plaint, bill, suit, or demand; or for want of an original or judicial writ; or by reason of any imperfect or insufficient return of a sheriff, or other officer; or for want of a warrant of attorney; or by reason of any manner of default in process, upon or after *aid prier* or *voucher*. This act, however, is not to extend to any appeal, indictment, or presentment of felony, or treason, or other matter; nor process thereupon; nor to a suit upon a popular or penal statute.

This statute was intended to take away all trifling impediments to the effect of a suit, after the merits had been decided upon by *verdict*. The stat. 27 El. c. 5. had the like design, when the merits had been considered in another way, namely, upon *demurrer;* it enacts, that after demurrer joined and entered in any action or suit in any court of the record within the realm, the judges shall proceed, and give judgment, as the very right of the cause and matter in law shall appear, without regarding any imperfection, defect, or want of form, in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding what-

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soever, except those only which the party demurring shall *specially* and particularly set down and express, together with his demurrer; nor shall judgment be reversed by error for any of the above causes not so set down and expressed; all which the court may, from time to time, amend. This act, as well as the former, is not to extend to criminal prosecutions, and acting upon popular and penal statutes. After this act there grew a distinction between demurrers, which were some *general*, and some *special*; and many questions arose both from this and the former, what was *form* and what *substance*. So that, though particular cases were helped by virtue of these acts, yet the debate upon points of pleading was, perhaps, increased rather than diminished; only much of this debate appeared in a new shape, and the matter was considered with different view and design.

For avoiding the number of small and trifling suits commenced in the courts of Westminster, which, by the due course of the law, ought to be determined in inferior courts, it was enacted by stat. 43 El. c. 6. that if any sheriff, undersheriff, or other person having authority, or assuming it, to break writs, shall make a warrant, as upon some process, not having such process; then, upon complaint to the justices of assise, or the judges of the court whence the process issued, not only the person making the warrant, but all procurers thereof, shall be sent for, by attachment or otherwise, and examined upon their oaths; and if it is proved by sufficient witnesses, or confession, they are to be sent to the gaol of the county, or court where it is examined, until they have paid to the party grieved 10*l.*, with costs and damages, to be ascertained by the court which heard the matter; besides which, every offender is to forfeit 20*l.* to the king. Another clause of this act ordains, that if upon any personal action commenced in the courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands,

nor for a battery, it appears to the judges of the court, and shall be so signified by the justices before whom the same is tried, that the debt or damages shall not amount to 40*s.* or more; then there shall not be awarded more costs than damages, but less, at the discretion of the court. (Extended to counties palatine, by 11 & 12 Will. 3. c. 9.)

CHAPTER XXXIV.

ELIZABETH.

Criminal Law.— Offences against Religion and the State.— Stat. 13 El. of Treason.— Jesuits and Seminary Priests.— Sectaries.— The Five-mile Act.— Common Offences.— Cutpurses and Pickpurses deprived of Clergy.— Purgation of Clerks abolished.— Housebreakers deprived of Clergy.— Offences against the Coin.— Gypsies.— Witchcraft.— Wandering Mariners and Soldiers.— Perjury.— Forgery.— Punishment of the Father of a Bastard Child.— Of Hue and Cry.

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ELIZAB. Criminal law.

In reviewing the penal laws of this reign, we find the greater and more striking part of them to be such as were the consequences of the late change in religion. A new description of delinquents originated from thence, who occasioned great alarm in the government, and were thought to demand the severe restrictions imposed by many laws, which, at this time, appear oppressive and sanguinary. However, the temper and designs of these nonconformists were such, that not only religion, but the safety of the state, was interested in the suppression of them: upon that idea we may account for the apparent want of moderation in some of these statutes. The subject of the queen's dignity and authority went hand in hand with that of religion; and so much was the protection of the one considered as conducive to the safety of the other, that a statute, 35 El. c. 1., which contains penalties against persons not attending divine service; is intituled an "*Act to retain the queen's majesty's subjects in their due obedience.*" It seems then the most natural method of illustrating this part of our criminal law, to take together the statutes relating to the royal state, and to religion; and so trace the progress of these alterations in the order in which they happened.

By stat. 1 El. c. 1. any persons defending the power or jurisdiction, spiritual or ecclesiastical, of any foreign prince, prelate, person, state, or potentate, within this realm, who do advisedly any thing for the maintenance or defence of it, they, their aiders and abettors, shall forfeit all their goods and chattels, real and personal; and if such offender has not goods and chattels to the value of 20*l.*, he is to be imprisoned for a year, and all his ecclesiastical preferments are to be utterly void. For the second offence, it is made a *præmunire*, and the third, high treason. Prosecutions, if for words only, to be within half a year, sect. 31. And stat. 1 & 2 Ph. & Ma. c. 8. sect. 40. is confirmed as to all cases thereby made *præmunire*, sect. 32. It is moreover ordained, that no person shall be indicted or arraigned for any offence under that act, unless there are two sufficient witnesses, or more, to testify and declare the said offences, sect. 37., a provision which we more than once find annexed to penal statutes in this reign. These are the penalties inflicted by this famous act, in addition to what we had before noticed concerning the oath of supremacy.

The next is the act of uniformity, which stands also next in the statute book: this comprises the same forfeitures and regulations as were before enacted in the two acts of uniformity, 2 & 3 Ed. 6. c. 1. and 5 & 6 Ed. 6. c. 1., in the reign of Edward the Sixth, respecting the use of the common prayer, the speaking in derogation of it, and not resorting to church. The Common Prayer had undergone some few alterations; therefore, it was necessary to re-enact this amended work, with all the protections and security which the former enjoyed. This was done in the very words of the two former acts, with the single alteration of the penalties and forfeitures being increased, sometimes more than double. Parsons and vicars, or ministers, not using, or speaking contemptuously of the Common Prayer, are, for the first offence, to lose the profit of all their spiritual promotions for a year, and to be imprisoned for six months; and, for the second offence, for a whole year, and to be

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ipso facto deprived of all their spiritual promotions; and the third offence is to have the additional punishment of imprisonment for life. If such offender has no preferment, he is to be imprisoned, for the first offence, one year; for the second, during life. The clause concerning interludes and songs in derision of it, inflicts the forfeiture of 100 marks for the first offence; 400 for the second; third offence, all the offender's goods and chattels, and imprisonment during life. Those not resorting to church, in addition to spiritual censures to which they were before subjected, are to forfeit 12*d.* for every offence. So far of these two acts, which are confined entirely to religion.

These are followed in the same sessions by stat. 1 El. c. 5., which enacts, that any person who shall compass or imagine to deprive the queen or the heirs of her body from the style or kingly name; or levy war or depose them; and shall utter the same by open words; or publish that the queen is not, or ought not to be, queen, such offender is to forfeit all his goods and chattels, and the profits of his lands during life: and if the same is done by writing, printing, overt-deed, or act, it is made high treason. The next statute (c. 6.) extended the penalties of stat. 1 & 2 Ph. and Ma. c. 3. against speaking of slanderous words against the king or queen, to Queen Elizabeth, and the heirs of her body. Both these acts, from the terms of them, expired with the queen's life. By ch. 18. of this act was revived, during the queen's life, stat. 1 Ma. st. 2. c. 12. against unlawful and rebellious assemblies.

The next statute is 5 El. c. 1., which complains of the "dangers by the fantors of the usurped power of the see of Rome, grown to marvellous outrage and licentious boldness, and *now requiring more sharp restraint and correction of laws* than hitherto in the time of the queen's majesty's most mild and merciful reign have been established." Therefore, any person by writing, cyphering, printing, preaching, or teaching, deed or act, defending the authority of the see of Rome within this realm, was, by this act,

subjected to a *præmunire*, sect. 2. The oath of supremacy ordained by stat. 1 El. c. 1. was to be taken for the future by all persons in ecclesiastical orders; those admitted to any degree of learning in any university; all schoolmasters, and public and private teachers of children; those admitted to degrees in the common law, as utter barristers, benchers, readers, ancients in the inns of court; principal treasurers, and such as be of the grand company of every inn of chancery; attornies, prothonotaries, and philizers; sheriffs, escheators, fœdaries; those admitted to any ministry or office in the common law; and all other officers or ministers of any court, sect. 5. And all persons refusing the oath, upon its being tendered, were subjected to the penalty of a *præmunire*. In case of a second offence, in defending, as before mentioned, the papal power, or refusing the oath on a second tender, three months after the first, it was made high treason, sect. 10, 11. But no one was to be compelled, under this penalty, to take the oath on a second tender, unless in the following cases: — if he was an ecclesiastic who had, in one of the three preceding reigns, an office, or charge in the church, or should have any in the queen's reign; if he had an office or ministry in the ecclesiastical court; or refused to observe the Book of Common Prayer, after admonition by the ordinary, or his officer; or depraved the church service; or should say or hear private mass.

It is directed that knights, citizens, and burgesses should take the oath before the lord steward, before they entered into the parliament-house; but the queen was so assured of the faith and loyalty of the temporal lords, that no barons were to be compelled to take the oath, sect. 16, 17. It is declared, that it should not be lawful to kill a person attainted in a *præmunire*, notwithstanding any exposition of law to the contrary; which probably alluded to the opinion given in parliament to the contrary in the reign of Henry the Eighth.

In the next parliament two more acts were made, one

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Stat. 13 El. of treason.

for the protection of the queen's person, the other to prevent the influence of the see of Rome. The stat. 13 El. c. 1. says, that it was doubted whether the laws and statutes then in force were sufficient for the surety and preservation of the queen. It was, therefore, thought proper to enact the penalty of treason in a way which would more effectually reach offenders in the first outset of traitorous attempts, than the statute of Edward the Third could; as that always required *an overt act* to demonstrate the intention of the mind. This statute, therefore, enacts, that if any person compass, imagine, invent, devise, or intend the death of the queen, or any bodily harm tending to death, destruction, maim, or wounding; or to deprive or depose her from her style, honour, or kingly name; or to levy war; or to move any foreigner with force to invade the realm; and such compasses, imaginations, inventions, devises, and intentions, should advisedly and expressly utter or declare by printing, writing, cyphering, *speech, words, or sayings;* or if any declared and affirmed, by express words, that the queen was not, or ought not to be, queen; or that any other person ought to be; or should advisedly, by writing, printing, or express words, affirm, that the queen was heretic, schismatic, tyrant, infidel, usurper, all such offences should be high treason. As also, if any one maintained or affirmed any right or title in succession or inheritance to the crown; or that the queen, with authority of parliament, was not able to limit the crown; or that the present statute was not good and valid.

And to avoid contentions and seditious spreading abroad of titles to the succession, it was enacted, if any one by book, or work printed or written, directly affirmed that any one particular person was or ought to be heir to the queen, except the issue of her body; or should spread any books or scrowls to that effect; or should print, bind, put to sale, or utter any such book or writing; such offender should be imprisoned for a year, and forfeit half his goods; and for the second offence incur a *præmunire*. So jealous was

this princess concerning the discussion or mention of this point of succession, that she did not scruple to revive those severe laws of her father which had been so wisely repealed, though in part re-enacted in the last reigns, till now they seemed to be put in all their original force. (Stat. 26 Hen. 8. c. 13. 1 Edw. 6. c. 12. 1 & 2 Ph. and Ma. c. 10. 1 El. c. 5.)

The former act seems to be made in support of stat. 1 El. c. 5. This, which follows, is made in aid of stat. 5 El. c. 1., and was intended to prevent the bringing in, and execution of, bulls and other instruments from the see of Rome. These were observed to have been imported in great abundance, and that many ignorant people had been reconciled to the Romish church. It was, therefore, enacted, that any person who shall put in use such bull, writing, or instrument of absolution or reconciliation; or who shall take upon him by colour of such to absolve or reconcile any one; or who shall receive willingly such absolution or reconciliation; or who *shall have* obtained, since the last day of the parliament holden in the first year of this reign, any bull of any kind; or shall put it in use; shall be adjudged guilty of high treason; and those who are aiders and maintainers after the fact, are to incur a *præmunire*. Thus far of those who use or receive; but the act goes farther, and makes those guilty of misprision of treason who do not disclose, within six weeks, whenever such bull shall have been offered to him, sect. 5.

Another species of offenders are considered in the next clause: for those who bring into the realm any token or things called *Agnus Dei;* or any crosses, pictures, beads, or the like superstitious things, from the see of Rome; or from any person who claim authority from that bishop, to hallow and consecrate such things, and deliver them to any to be worn; both those who give and those who receive are subjected to a *præmunire*. There are provisions in favour of those who deliver up to some magistrate such tokens or bulls to be destroyed, within a certain limited time; and a

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pardon, for those who, having been reconciled to the bishop of Rome, confess it, and submit themselves.

These two acts were made when the jealousy of the Queen of Scots and her Catholic adherents began to be serious, and called for every defence which the law could provide for the queen's person and government. The next chapter of this act, no doubt, had the same object in view, and was meant to co-operate towards keeping the subject in due obedience, untinctured by foreign influence and notions. It enacted (13 El. c. 3.), that any one born within the realm, or free denizen, who departed the realm without the queen's licence, and did not return within six months after proclamation, should forfeit all his goods and chattels, and profits of all his lands during life: the same of those who did not return within six months after the expiration of their licence. This act expired soon.

The alarming state of public affairs produced in the next year an act of a severe kind, conceived upon the idea of stat. 13 El. c. 1. This was stat. 14 El. c. 1. which enacted, that any one who should unlawfully, and of his own authority, compass, imagine, conspire, practise, or devise, rebelliously to take or keep any of the queen's castles, towns, fortresses, or holds; or to raise, burn, or destroy any castle, fort, or bulwarks, having munition or ordnance of the queen's therein; and should declare it by *express words, speech,* act, deed, *or writing;* should be adjudged a felon, without benefit of clergy. So far of *conspiring* to do the above acts. It was further enacted, that if any kept or detained from the queen any of her castles, towers, fortresses, or holds; or any of her ships, ordnance, artillery, or other munition or fortifications of war; and did not render them in six days, after demand by proclamation; or should burn or destroy any of the queen's ships, or cause any haven to be barred; it should be high treason.

And to secure the execution of this act, because the law had provided no sufficient punishment in cases of rescue, or escape of prisoner, unless the escape or rescue was really effected, it was enacted by the next chapter of this

same statute, that it should be misprision of treason to imagine, conspire, devise, invent, or go about unlawfully, to set at large any person committed for treason, or suspicion thereof, before indictment, and for to declare such conspiring, by express words, writing, or other matter. If after indictment, it was to be felony; if after attainder, high treason.

There are no statutes relating to the queen's person till stat. 23 El. c. 1. & 2., when, as usual, there was one made concerning religion to accompany it.

The stat. 23 El. c. 1. was made in aid of stat. 13 El. c. 2. concerning bulls; and is intended to draw closer the restrictions on nonconformists. It enacts, that persons who put in practice any pretended authority to withdraw others from their natural obedience to the queen; or who, for that intent, withdraw them from the established religion; or who move them to promise any obedience to the See of Rome; and also the persons so withdrawn, or who shall so *promise*, are to be adjudged guilty of high treason. Every person saying mass is to forfeit 200 marks, and be imprisoned a year; and those who hear mass, are to suffer the same imprisonment, and forfeit 100 marks. All persons above sixteen years who do not come to church according to the statute of uniformity, 1 El. c. 2. are to forfeit 20*l.* every month of such absence. After a person has so done for twelve months, there is to be a certificate thereof transmitted by the bishop, or justice of peace, to the King's Bench, and then he is to be bound with two sureties in 200*l.* at least to his good behaviour, and so to continue till he comes to church, sect. 4. Again, if any person or body corporate, employ a schoolmaster who does not come to church, or is not allowed by the bishop, they are to forfeit 10*l.* per month. However, such persons are excepted out of the penalties of this act who are usually present on Sunday at divine service as established by law in his house, and does not obstinately refuse to go to church; provided that they go to church four times a year at least, which by this act is required of every body whatsoever.

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So much for this severe law, which is followed by one (stat. 23 El. c. 2.) against seditious rumours uttered against the queen. It repealed two former statutes of the like kind, namely, stat. 1 & 2 Ph. & Ma. c. 9. and 1 El. c. 6., and enacted that a person who spoke *of his own imagination* any false, scandalous, and seditious news, rumours, sayings, or tales against the queen, should be put in the pillory and have both his ears cut off, unless he chose to pay 200*l*., and suffer six months' imprisonment; and if he spoke such news *of the report of another*, he was to lose one of his ears, unless he would pay the same fine, and suffer imprisonment for three months. A second offence was felony, without benefit of clergy. If any one should devise, and write, print, or set forth any book, rhyme, ballad, letter, or writing, containing scandal and sedition against the queen; or to encourage or stir up any insurrection or rebellion, or should cause such to be printed, written, or published, it was made felony without clergy. And to prevent idle and malicious conjectures about the queen's life; it was further enacted, that all persons, who, by erecting any figure, casting of nativities, or by calculation, prophesying, witchcraft, conjurations, or other unlawful means, should seek to know, and should set forth by express words or deeds how long the queen was to live, or who should reign after her; or should utter any direct prophecies to such intent; or should by words, writing, or printing, wish, will, or desire the death of the queen, should be guilty of felony without clergy.

The parliament, which met in the 27th year of the queen, passed two acts, dictated by the exigency of affairs: one to confirm the association entered into for the protection of the queen's person; another for suppressing jesuits and seminary priests. The situation of the Queen of Scots had become more critical; hostilities had commenced with Spain; and the zeal of the Catholics was proportionably quickened by the great objects in contemplation. The legislature kept pace with the discontented party, and now

devised the two statutes above mentioned, directed against the enemies of the established religion and the state. By the former of these (stat. 27 El. c. 1.), it was enacted, that in case of any invasion or open rebellion, or any act against the queen's person, by or in behalf of one who pretended a title to the throne after the queen's death, or any thing should be compassed or imagined to that intent; the queen might grant a commission to certain lords, privy counsellors, and judges, to the number of twenty persons, to examine offences of that kind, and to give judgment, as, upon proof, they should think fit: and such judgment being published by proclamation, should exclude from the throne such against whom it was pronounced. And all the queen's subjects might lawfully by all forcible and possible means *pursue to death* such person by whose means or privity such invasion or rebellion should be denounced in the above form to have been attempted, done, or imagined. And such person by whom any such act against the queen's life should be executed, should be excluded from any claim to the crown, and be pursued by all the queen's subjects to death as before mentioned. This is the substance of this famous act, of which the Queen of Scots was evidently the object. This is the last statute which was passed in this reign to contrive any extraordinary means of protection for the queen's life, or to inflict any new penalty on such offenders. They were all made to continue only during the queen's life, and of course expired with it. The remaining statutes on this head are confined entirely to religion.

Jesuits and seminary priests.

The stat. 27 El. c. 2. was directed against some new objects of jealousy; the jesuits and seminary priests. The English priests, who had fled to the Netherlands, assembled themselves at *Douay* in 1568, and there had formed themselves into a college; afterwards, when they were banished thence, another seminary was erected at *Rheims*, and another at *Rome*; which, as time consumed the popish priests in England, might still supply new ones, to sow the seeds of the

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Romish religion here. For this reason they were called *Seminaries*, and those bred up there were commonly called *Seminary Priests*. Out of these colleges were sent forth, into England and Ireland, many young men, hastily put into holy orders, and full of the principles there taught. Fully persuaded of the divine right of the pope over causes, as well temporal as spiritual; bearing a virulent hatred against the queen, and hope of restoring the catholic religion by means of Mary Queen of Scots. These persons pretended only to administer the sacraments of that religion, and to preach to papists; but it was soon found, that they were sent under-hand to seduce the queen's subjects from their allegiance, and to prevail on them to be reconciled to the church of Rome. To these seminaries were sent out of the kingdom great numbers of young men of all sorts, who were admitted into the college upon making a vow to return again to England. The jesuits also, about the year 1580, began to come into England. These two descriptions of papists were the most dangerous, and were daily creeping over into this country. Several proclamations, according to the practice of these times, were made against entertaining these persons, and sending over children to be educated in these seminaries. (Cambd. 244, 245, 246.)

At length the legislature came to a resolution, to pass a standing law against such suspicious persons. It is accordingly enacted by stat. 27 El. c. 2. that all jesuits, seminary priests, and other priests whatsoever, ordained by any authority from the see of Rome, should, within forty days after the end of the parliament, depart the realm. And it shall not be lawful for any jesuit, seminary priest, or other priest, deacon, or religious or ecclesiastical person whatsoever, being born within the realm, and ordained as abovementioned, to come into, or remain within the realm, after those forty days, under pain of high treason. And the knowingly receiving, relieving, or maintaining any such person is made felony without clergy. So far of persons in orders. It is enacted, if any of the queen's subjects, not

being of the above description, brought up in any college of jesuits or seminary beyond the seas, shall not, within six months after the proclamation, return, and within two days after, submit himself to the law; then he shall, upon his return, in any other way, without submission, be adjudged a traitor. Those who shall send over sea any relief or maintenance to any of the above-mentioned persons, or to any college or seminary, are to incur a *præmunire*, (sect. 6.) And to prevent the increase of noviciates in those places, it is enacted generally, that none shall send their children, or others, being under their government, to any parts beyond seas; without special licence of her majesty, and four of her privy council (except those, whom merchants send abroad on affairs of trade, and mariners), under pain of forfeiting 100*l.* (sect. 7.) To promote the discovery of these offenders, any persons knowing a jesuit, seminary, or other priest, to be within the realm, and not disclosing it to some justice, or other head officer within twelve days, shall be fined and imprisoned at the queen's pleasure; and such justice not giving information to some privy counsellor within twenty-eight days, shall forfeit 200 marks.

Any of these persons might, within the forty days, or within three days after his return into the realm, submit himself to some archbishop, bishop, or justice of the peace, and truly and sincerely take the oath of supremacy, ordained by stat. 1 El. c. 1., and by writing under his hand confess and acknowledge, and from thenceforth continue, his due obedience to the laws, statutes, and ordinances made, or to be made, in causes of religion; and should thereupon be discharged of the penalties of this act, (sect. 10.) However, if such person, within ten years after submission, come within ten miles of the queen's residence, without the queen's licence in writing, he was to lose all benefit of his submission.

There was a statute made in 29 El. (c. 6.) to enlarge and enforce the payment of the penalties ordained by stat.

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23 El. c. 1. It provides that every person, once convicted under that act for not going to church, shall, at the Easter or Michaelmas, whichever follows next after his conviction, pay into the exchequer 20*l.* for every month contained in the indictment; and also, for every month after such conviction, without any fresh indictment, in like manner, 20*l.* per month, as much as shall remain unpaid. And if default is made in any payment, all his goods and two parts of his lands may be seized and enjoyed by process out of the exchequer, leaving a third part for maintenance of the offender and his family.

The two last statutes made in this reign, against these offenders in matters of religion, were in the thirty-fifth year of the queen. The first of these was designed "to prevent the inconveniences which might follow from the dangerous practices of *seditious sectaries* and disloyal persons." This was levelled at the Puritans and other Nonconformists of that description. The makers of stat. 23 El. had probably an eye to the new set of religious malecontents; as that act provides penalties against such as refuse to attend the service of the church, (the great criterion to discover people of these sentiments,) and bears the same title with this: "An act to retain the queen's majesty's subjects in their due obedience." The republican notions of these people rendered them less patient of lawful authority, it was then thought, than the papists naturally were; and were therefore considered, more properly than them, under the description of disobedient and disloyal. The other of these two acts was against popish recusants.

Sectaries.

To begin with stat. 35 El. c. 1. It is thereby enacted, that if any person, above the age of sixteen years, who has obstinately refused to repair to church, and forborne so to do for one month, shall, after forty days, after that sessions of parliament, by printing, writing, or express words or speeches practise to persuade any of the queen's subjects to deny her power and authority in cases ecclesiastical; or

to that end, shall persuade any one from going to church; or to be present at any unlawful assemblies, conventicles, or meetings, or shall himself join in such assemblies; such person shall be committed to prison until he conform, and make open submission and declaration of such conformity. And if he does not so comply within three months, being required by the ordinary or a justice of the peace, he shall, being warned and required so to do by a justice of peace, upon his oath, in sessions, abjure the realm, and depart; which abjuration is to be entered of record. And if he refuse to abjure, or after such abjuration he neglect to depart, or shall return without the queen's licence, it shall be felony without clergy.

However, if a person who has incurred the penalty of this act, shall, before he is warned and required by some justice to make abjuration, go to some church on Sunday, and there make open and public submission to the law, he is to be discharged of the penalty. A form of which submission is set forth in the act. This submission to be entered in a book in the parish, and to be certified to the bishop. Any person who entertains, receives, or maintains offenders under this act, after notice given to him by the ordinary, justice of assize or of the peace, the minister, curate, or churchwarden, shall forfeit 10*l.* per month, during the time he so does: but this is not to extend to persons who relieve a wife, father, mother, child, ward, brother, sister, wife's father or mother, *not having any certain habitation of their own;* or the husbands or wives of any of them, sect. 9. Persons abjuring are to forfeit all their goods and chattels, and lose all their lands during life, sect. 13. It is provided that no popish recusant (who were reserved for another kind of proceeding, as we shall see,) nor feme covert should be bound to abjure by virtue of that act, sect. 12. These were the compliances expected from the sectaries, and such were the penalties on those who refused to conform, in which there is nothing sanguinary; but in case of disobedience to the oath of abjuration, however, the severe

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sanctions under which they were required to join in the national worship, and to abstain from their own, were sufficiently grievous.

The five-mile act.

It was also now thought better to order and regulate *Popish recusants*, than to increase the number of sanguinary laws already made. The stat. 35 El. c. 2. was made with that view, and contained some directions similar to those enacted in the last statute regarding the sectaries. Though the puritans, from their liberal notions respecting religion and government, had drawn upon themselves the imputation of disloyalty and sedition, they had never experienced the free language applied to the Roman catholics. This act speaks "of traitorous and dangerous conspiracies and attempts, daily devised by sundry wicked and seditious persons, who, terming themselves catholics, *and being indeed spies and intelligencers*, not only for her majesty's foreign enemies, but also for rebellious and traitorous subjects born within her dominions; and hiding their most detestable and devilish purpose under a false pretext of religion and conscience, do secretly wander and shift from place to place, to corrupt and seduce her majesty's subjects, and to stir them to sedition and rebellion." This is the character given of the persons who are the objects of this act. They, therefore, applied to them a policy which had been before attempted with regard to jesuits and seminary priests, who had submitted, of confining them for a certain time to a particular distance from the court: this was now applied, in another shape, to all *Popish recusants*. (*a*) It is enacted, that every person above sixteen years of age, being born within the realm, or made denizen, and having any certain place of dwelling, who, being then a popish recusant, shall be convicted for not repairing to church, shall, within forty days after such conviction, repair to the place of his usual dwelling or abode, and shall not remove above five miles from thence, upon pain of forfeiting all his goods and chattels and his lands

(*a*) These are the first acts in which *Popish recusants* are mentioned under that appellation, namely, 35 El. c. 1, 2.

during life. And those who have no certain place of dwelling are to repair to the place where they were born, or where their father or mother then dwell, and there stay, under the above penalty, sect. 4. And all such persons, within twenty days after their coming to any of the said place, are to notify their arrival, and present themselves, with their names in writing, to the minister or curate, and to the constable or headborough of the town: the minister or curate to make an entry thereof in a book, and to certify it to the justices in sessions, who are to cause it to be entered in the rolls.

But because some were not of ability to answer any competent penalty, the act further provides another course to be taken with them; for all persons of that kind (not being femes covert, not having lands or hereditaments of 20*l. per annum*, nor goods and chattels to the value of 40*l.*), being popish recusants, and offending as above, and neglecting to comply with the directions of this act, who shall not within three months after being apprehended, conform to the laws in coming to church, and making open submission, when required by the bishop or a justice of peace, shall abjure the realm in the like manner, and with the like penalty for disobedience, after such abjuration, as is mentioned in the last act. Persons by this statute confined to the space of five miles round their usual dwelling-place, may exceed those limits upon having a licence to travel, under the hands of two justices, with the assent of the bishop, lieutenant, or deputy-lieutenant of the county. And persons bound to appear to process out of any court *bonâ fide*, shall not incur any penalty.

Any person, before he is convicted of any offence against this act, who shall in the parish church, on Sunday or other festival day, hear divine service, and then, before the sermon or reading the gospels, make public and open submission (a form of which is given in the act) and declaration of his conformity, shall, in like manner as offenders under the last statute, be discharged of the penalties of this

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act, unless he afterwards relapses, sect. 15, 16. 18. This submission to be entered in a book by the minister, and certified within ten days to the bishop, sect. 17. Any person suspected to be a jesuit, seminary, or massing priest, who shall refuse to answer whether he is so, when examined by a person having lawful authority, shall be committed to prison without bail or mainprise till he does, sect. 11.

With this concludes this head of statutes relating to religion and the government. The object of these laws, as well as the design and scope of them, required that they should be treated somewhat minutely. While they show the great effect which was at that time attributed to the powers of legal provision, they display, in a remarkable manner, the extent to which our criminal law was then strained; and, on all accounts, they deserve a particular regard in the history of our jurisprudence.

Common offences.

The remaining penal statutes concern common offences, of which those first deserve notice which make any alteration in crimes that before existed at common law, such as taking away clergy. We shall, after them, consider those which respect the coin, and then such as relate to common felonies and misdemeanors.

Cut-purses and pick-purses deprived of clergy.

Of the former kind, the first which presents itself is stat. 8 El. c. 4., made against the *cut-purses* and *pick-purses* of that time. The preamble of this act, as it fully describes the persons against whom the law was levelled, and that in a very particular manner, is worthy of notice. It speaks of them as "a certain kind of evil-disposed persons, commonly called cut-purses, or pick-purses, but, indeed, by the laws of this land, very felons and thieves," who "do confeder together, making among themselves, as it were, a brotherhood or fraternity of an art or mystery, to live idly by the secret spoil of the good and true subjects of this realm; and, as well at sermons and preachings of the word of God, and in places and time of doing divine service and common prayer in churches, chapels, closets, and oratories; and not only

there, but also in the prince's palace, house, yea, and presence; and at the places and courts of justice, and at the time of ministration of the laws in the same; and in fairs, markets, and other assemblies of the people; yea, and at the time of the doing execution of such as been attainted of any murder, felony, or other criminal cause, ordained chiefly for terror and example of evil-doers, do, without respect or regard of any time, place, or person, or of any fear of God or the law, under the cloak of honesty by their outward appearance, countenance, and behaviour, subtilly, privily, craftily, and feloniously, take the goods of divers good and honest subjects from their persons, by cutting and picking their purses, *and other felonious sleights and devices*, to the utter undoing and impoverishing of many." After this it is enacted, that no person who shall be indicted or appealed for felonious taking of any money, goods, or chattels, from the person of any other *privily without his knowledge*, in any place whatsoever, and shall be convicted by verdict or confession, or will not answer directly, or shall stand wilfully mute, or challenge peremptorily above twenty, or be outlawed, shall be admitted to his clergy.

An exact attention to the wording of this act has induced many to think, that the construction of it is overstrained when applied, in general, to modern pickpockets. It is observed, that, according to the fashion of dress in those days, the purse used to hang at the girdle, and that the persons described in the preamble were such, who, under the appearance of gentlemen, could introduce themselves into all companies and places; that the cutting or picking of purses of that kind was a very different act from the business of picking pockets. To this, perhaps, it might be added, consistently enough with the strictness sometimes observed in construing laws so very penal as this, that when the fashion of dress was altered, there no longer remained the subject intended by this act, and that no offence could be committed under it. But this, perhaps, is allowing too great influence to the preamble of a statute, which,

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it is well known, though generally explanatory of the occasion of an act, is not always to control the wording of the enacting clause; and in this instance the enacting part is so general, as well to warrant the practice which has been founded on it for many years.

This statute makes another very material provision respecting clergy. It sometimes happened that a man who had before committed some felony, from which clergy was taken away, would afterwards be arraigned for some single felony upon which he would be allowed his clergy, and after that he could not, by law, be impeached for the former offence. To remedy this, it is enacted, sect. 4., that every person who shall be admitted to his clergy, and be delivered to the ordinary and make his due purgation, and shall before such admission have committed any other offence whereupon clergy is not allowable, may be indicted and used in all things according to the law, as though no such admission to clergy had been.

The next statute relating to clergy is stat. 18 El. c. 7., which ordains, that if any person commit any manner of felonious *rape*, ravishment, or *burglary*, and shall be found guilty, outlawed, or confess, he shall suffer death, and forfeit as in cases of felony, without any allowance of the benefit of clergy. And for plain declaration of the law upon this point, it is also enacted, sect. 4., that if any person shall unlawfully and carnally know and abuse any woman child under the age of ten years, it shall be felony without allowance of clergy.

Purgation of clerks abolished.

In order to avoid perjuries and other abuses in the purgation of clerks convict delivered to the ordinary, it is by the same statute enacted, that persons admitted to their clergy shall not be delivered to the ordinary, as had been accustomed, but after clergy allowed, and burning in the hand, according to stat. 4 Hen. 7. c. 13., shall forthwith be enlarged out of prison. However, the justice may, for the further correction of such persons, keep them in prison for such time as they, in their discretions, shall think con-

venient, so as it does not exceed one year. By which provision the benefit of clergy, after many and various qualifications and changes, was, at length, reduced to its present appearance; for the subsequent clause of this act is only a more full declaration of what had been provided by stat. 8 El. c. 4. § 4. That act had enacted, that persons admitted to their clergy should, notwithstanding, answer to indictments for former felonies not clergyable, if they had made their purgation; but now, as stat. 18 El. had taken away the necessity of making purgation, on that account, as well, perhaps, as to extend the provision of stat. 8 El. to *all* former felonies, it is now by the present act further enacted, that all persons who are admitted to the benefit of clergy shall, notwithstanding, be put to answer to *all other felonies*, and suffer execution for the same, as though they had been delivered to the ordinary and made their purgation.

There are two other acts which take away clergy from felons, made in the latter part of this reign. Stat. 39 El. c. 9. takes away clergy from the principals, and accessaries before, under stat. 3 Hen. 7. c. 2., of stealing heiresses, if they are convicted, or attainted stand mute, make no direct answer, or challenge peremptorily above twenty jurors. And by chap. 15th of the same act, clergy is taken from a certain species of *housebreakers*. To understand the design of this act, we must consider the preamble, which has, in this case, been allowed to govern, in some degree, the enacting clause, though that of stat. 8 El., as we before observed, has been disregarded. It recites that "divers lewd and felonious persons, of late years, understanding that the penalty of the robbing of houses in the day-time (no person being in the house at the time of the robbery) is not so penal as to commit a robbery in any house, any person being therein at the time of the robbery, which has emboldened divers lewd persons to watch their opportunity and time to commit many heinous robberies, *in breaking and entering* divers honest persons' houses, and especially of the poorer sort of people, who, by reason of their poverty,

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are not able to keep any servant, or otherwise to leave any body to look to their house when they go abroad to hear divine service, or from home to follow their labour to get their living, which is to the hinderance and loss of good subjects, and the utter impoverishing of many poor widows, sole women, and other people." After thus setting forth the occasion of the act, it is ordained, that if any person shall be convicted by verdict, confession, or otherwise, according to law, for *the felonious taking away*, in the day-time, of any money, goods, or chattel, being of the value of five shillings or upwards, in any dwelling-house or houses, or any part thereof, or any outhouse or outhouses belonging to and used with any dwelling-house, although no person shall be in the said house or outhouse at the time of such felony committed, then such persons shall not be admitted to their clergy. Upon this act it has been held, that, notwithstanding the enacting clause speaks only of a felonious taking, and, in fact, takes away clergy from a simple larceny; yet, as the preamble mentions *breaking and entering*, and *robbing, no person being therein*, this has been considered as an interpretation of the meaning of the legislature, and these circumstances are considered as necessary to be laid and proved to constitute an offence under this statute.

The former acts, which had taken away clergy from certain larcenies, had been framed with an eye to certain circumstances attending this crime, as *putting in fear in a dwelling-house, privily*, and the like. This is the first which took into the account of criminality the value of the thing stolen. Now, therefore, as the case of stealing under the value of 12*d.* was not within any of the former acts, if the thing taken was valued at less than 5*s.*, the offender was out of the penalty of this law. As this valuation is left to the discretion of the jury, who estimate it, with all equitable allowances for the changes which happen in the value of money at different periods, no great inconveniencies, if any, arise from fixing such a stated price upon a man's life; and the legis-

lature have accordingly adopted this mode, among others, of marking the degrees of this offence in several subsequent statutes.

After the discordant opinions that have been mentioned in different parts of this history on the subject of principal and accessory, it will be a satisfaction to find that former precedents have been reviewed, and after some attempts made to reconcile them, to see the law on this important article settled on authority. This seems to have been done at least by the latter end of this reign. In *Syer*'s case, we find it resolved by the whole court, that if the principal is pardoned, or has his clergy, the accessory cannot be arraigned, according to the old maxim, *ubi factum nullum, ibi fortia nulla;* and none can be called principal till he is so proved and adjudged by law, and that ought to be by *judgment* on verdict, confession, or outlawry: and, therefore, when the principal is pardoned, or takes his clergy *before* judgment, the accessory shall never be arraigned, because there is no judgment against the principal; but if the principal is pardoned, or has his clergy after judgment, the accessory shall be arraigned. (4 Rep. 43.) In *Bibithe*'s case, about six years after, it was held there could be no accessory before to manslaughter, or rather, according to Lambard, chance-medley, because it must always be on a sudden affray; and because the principal had his clergy before judgment, the accessories were not arraigned, upon the authority of *Syer*'s case, which was recognised as settled law. (*Ibid.* 44.)

Notwithstanding the humour of the times was to take away clergy from certain offences, that privilege was in no disfavour in our courts, wherever an offender was entitled to it by law. Perhaps, since some felonies had been deprived of this privilege, it was thought the legislature meant to speak plainly, that all other felons were not such as merited capital punishment, and therefore their claim of clergy should be favoured as much as possible, to assist the above distinction. It was the opinion of all the justices of assize

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assembled at Serjeants'-Inn, that if a felon in a clergyable felony prayed the book, and was found not able to read, and it was recorded by the ordinary and the court *non legit ut clericus;* yet, if he should be kept in prison till another sessions, and upon being asked should read, he should still have his clergy, notwithstanding the above record. And they quoted a case in the time of Henry the Sixth, where it is said this privilege should be allowed even under the gallows. Yet they still pretended to lay down the old law upon this head; namely, that a gaoler who taught a prisoner to read, would be now punished for a contempt. (3 & 4 El. Dyer, 205. 6.)

It seems that, before the statute of the 18 El., the whole matter of granting and recording clergy was reduced to a mere formality. The following case, which happened in the fourth of the queen, will be an instance of this, as well as a proof of the necessity for stat. 8 El. about clergy. One *Stone* had committed two felonies in one day, one clergyable, the other not. He was first indicted of that which was clergyable, and being found guilty, *petit librum, et tradito ei libro legit ut clericus*, and this was entered by the clerk; but no such words as *traditur ordinario.* And yet he was reprieved, without any judgment being passed; and then, at a subsequent sessions, he was indicted of the other felony, and arraigned upon it: he was found guilty of this also, *et tunc petiit librum, et habuit, et legit, sed non crematur, neque traditur ordinario,* all which was so entered with a *curia advisare vult, &c.* and judgment was respited for a year; when the recorder of London, before whom it had been brought, proposed the question to the judges, whether he should have judgment to be hanged, or should be delivered to the ordinary as a clerk convict; and, being debated by the justices of both benches and assize at Serjeants'-Inn, seven of them were of one opinion, and six of another. Catlin, the chief justice; A. Browne, justice; Bendloe Pountrel, Welshe, and Harper, serjeants; and Gerard, attorney-general, held that he should have judgment to be

hanged, because no judgment of clerk convict had been given against him on the former indictment; and besides, the second offence, they said, should be construed more in favour of the queen; namely, that it was committed since the first arraignment, and if so, the plea of autrefoit convict would not avail him. On the other hand, Dyer, chief justice; Sanders, chief baron; Whiddon, Corbet, and Weston, justices; and Carus and Cholmley, serjeants, were of opinion that the not entering the *tradatur ordinario* was a default in the court, and should have been entered of course. His life, they said, had been once in jeopardy; and it shall not be intended that the felony for which clergy did not lie was committed before the other, for by the indictments they appear to be both done the same day, and *in favorem vitæ* the most merciful side should be taken.

It is observed by Dyer, that though the present felony was committed after the other, yet if the felon had had *judgment* on the former indictment, as a clerk convict, though he was not delivered to the ordinary, he ought not to be arraigned on the second indictment; because he was discharged by the conviction from all felonies committed by him before the conviction; because he ought, according to Staunforde (fol. 108.), to be charged with all his offences before his clergy is allowed, or, at least, before he goes from the bar. For on the same day, as soon as the court have recorded *quod legit ut clericus*, he shall be said to be the prisoner of the ordinary, though he actually returned to the prison from whence he was brought, otherwise the stat. de clero 25 Ed. 3. c. 5. would not be observed. There seems to have been a difference of opinion, or, at least, of practice, in the entry of the prayer of clergy; some would have it, *et tradito ei libro legit ut clericus, et tradatur ordinario*; and not in the style of a judgment, *ideo tradatur ordinario*, &c. It was said by the clerks of the King's Bench, that the latter was the form they used. (4 El. Dyer, 214. 48.) It appears from the case of *Holcroft* before mentioned, which though was two years after the statute, that these

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entries of clergy were not regularly made; and they there held that the party should not be prejudiced by an omission of the court; but, if no clergy was even prayed, but being a clergyable offence, the judgment was respited, and it passed over in silence, as was the common way, the party should have the same benefit of it, if it was necessary to plead it on any future occasion.

The debated point, whether on a conviction of manslaughter in an appeal, (*vid. ant.* and 3 El. Dyer, 201. 67. and 9 El. Dyer, 261.) the crown could pardon the burning in the hand, was at length settled in *Biggen*'s case, at the latter end of this reign. It is said, that an appeal being the suit of the party, and by stat. 4 Hen. 7. c. 13. the burning of the hand being part of the punishment, it could not be remitted by the crown. But on conference with the judges it was resolved the pardon would be good; for the burning in the hand was not ordained by stat. 4 Hen. 7. as a punishment, but merely to signify to the judge whether the party had had his clergy before or not. Again, it was objected, conformably with what was laid down in that former case, that the queen could not pardon the imprisonment; so now it was said, though the burning in the hand might be pardoned, yet the defendant might be imprisoned at the suit of the party; for now there was this additional reason, that by stat. 18 El. they cannot deliver the prisoner before he is burnt in the hand. But they resolved, that though by that act the prisoner, after clergy allowed and burning in the hand, should be presently enlarged; and though they held that act to extend to appeals as well as indictments, yet, they said, as the queen had pardoned the burning in the hand, the party, by construction of that act, should be discharged of his imprisonment, otherwise he must, upon the above objection, remain perpetually in prison. (5 Rep. 50.)

Offences against the coin.

Next follow the acts concerning the coin. It had been made treason by stat. 3 Hen. 5. c. 6. to clip, wash, round, or file the coin. This had been repealed by the general

repealing act of Queen Mary. This practice, therefore, had of late been more boldly continued, as the statute says, *for wicked lucre and gain's sake*, on which account it was now enacted by stat. 5 El. c. 11. that clipping, washing, rounding, or filing, for wicked lucre or gain's sake, of the proper money or coin of this realm, or of the money or coin of any other realm allowed and suffered to be current within this realm, by proclamation, shall be adjudged treason. But there were other ways of injuring the coin besides those described in that act, which occasioned another to be made, stat. 18 El. c. 1., which declares, that if any person, for wicked lucre or gain's sake, *by any art, ways, or means whatsoever*, shall impair, diminish, falsify, scale, or *lighten* the proper coin of this realm, or the coin of any other realm allowed and suffered to be current within this realm, by proclamation, it shall be deemed treason. These two acts extend to counsellors, consenters, and aiders; and both of them save the corruption of blood which would otherwise follow upon the attainder, and also the wife's dower.

In the mean time it was, by stat. 19 El. c. 3., made misprision of treason falsely to forge or counterfeit any such coin of gold or silver as is not the proper coin of this realm, not permitted to be current within the realm, which extends also to procurers, aiders, and abettors.

We shall now go through the felonies enacted by parliament in the order in which they arose. First, we find it was made felony, by stat. 1 El. c. 10., to convey, or procure to be conveyed, into any ship or vessel any leather, tanned or untanned, or any tallow, with intent to transport them beyond sea. This, however, was repealed by stat. 18 El. c. 9. Then stat. 5 El. c. 10. revives the stat. 22 Hen. 8. c. 7., concerning servants embezzling their master's goods, which had been repealed by the general repealing act, stat. 1 Ma. st. 1. c. 1.; and ch. 17. of the same act revives also stat. 25 Hen. 8. c. 6., made for the punishment of buggery, which had also been repealed by the statute of Mary.

In the parliament of the 5th El. there was an act made,

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Gypsies.

c. 20., to explain stat. 1 & 2 Ph. & Ma. c. 4. concerning *Ægyptians*. It had become a doubt whether that act was not confined to such persons who were foreigners by birth, and not to those who being born within the realm became of their company, and counterfeited their speech and manner. It is, therefore, declared, by stat. 5 El. c. 20., that the former act shall continue in force; and to remove the doubt, it enacts further, that *every person* who shall be seen in any company of vagabonds, commonly called Ægyptians, or counterfeiting, transforming, or disguising themselves, by their apparel, speech, or other behaviour, like Ægyptians, and shall so continue at one or several times for the space of a month, shall be judged felons, without the benefit of sanctuary or clergy; and, moreover, shall be tried by people of the county, and not *per medietatem linguæ*. The penalty of this act not to extend to children under fourteen years. In further explanation of the act of Ph. & Ma., it is declared that it is not to be considered as compelling people born within the realm to depart, but only to leave that course of life.

As a companion to this act, the parliament in the same session passed another, c. 16., against *witchcraft and enchantments*, containing very severe and sanguinary penalties against these imaginary crimes. The stat. 33 Hen. 8. c. 8. had been repealed by stat. 1 Ed. 6. c. 12., and as no law was now in force to punish the offenders, it was enacted by stat. 5 El. c. 16., if any person use or practise any invocation or conjuration of evil and wicked spirits, or practise any witchcraft, enchantment, charm, or sorcery, whereby any one shall happen to be killed or destroyed, it shall be felony without clergy: and if any one be thereby wasted, consumed, or lamed, in body or member, or any of his goods destroyed or impaired, such offender is to be imprisoned for a year, and to stand in the pillory once a quarter during that time for six hours; and, for a second offence, shall be treated as a felon without benefit of clergy. And further to put an end to all practices of this kind, any person taking upon him, by witchcraft, enchantment, charm, or sorcery,

Witchcraft.

to tell in what place any treasure of gold or silver, or stolen goods, might be found; or using the above practices with *intent* to provoke any one to unlawful love; or to hurt or destroy any one in body, member, or goods, is to suffer imprisonment and pillory, and for the second offence to be deemed a felon without clergy, as in case of those who do *actual* mischief. (Repealed by stat. 1 Ja. 1. c. 12.)

Thus were several former acts revived with additional severity. To these may be added stat. 1 Eliz. c. 7., which revives stat. 23 Hen. 8. c. 16., making it felony to sell, exchange, or deliver within Scotland, or to the use of any Scotsman, any horse. (Repealed by 4 Ja. 1. c. 1.)

The exportation of sheep was restrained under severe pains by stat. 8 El. c. 3. Any person who shall deliver, send, receive, *or procure* to be delivered, sent, or received, into any ship, any rams, sheep, or lambs, being alive, to be conveyed beyond sea, is to forfeit all his goods, half to the queen, and half to him that will sue for the same; he is further to suffer a year's imprisonment, at the end of which he is, in some market-town, in the fulness of the market, on the market-day, *to have his left hand cut off*, which is to be nailed up in the most public place of the market. The second offence is made felony. Another felony was created by stat. 31 El. c. 4., which inflicts that penalty on persons who have charge or custody of any armour, ordnance, munition, shot, powder, or habiliments of war, belonging to the queen; or of any victuals provided for victualling any soldiers, gunners, mariners, or pioneers; and shall for lucre or gain, or of purpose to hinder her majesty's service, embezzle, purloin, or convey away any of the above-mentioned articles. This act has a clause similar to one we have before remarked upon in a statute of Edward the Sixth, namely, that "such person as shall be impeached for any offence made felony by this act, *shall, by virtue of this act*, be received and admitted *to make any lawful proof* that he can, *by lawful witness or otherwise, for his discharge and defence.*" Miserable, indeed, was the condition of prisoners when they needed the direction of an act of parliament to secure them

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Wandering mariners and soldiers.

a fair and candid hearing, as well of their defence as of the proofs for the prosecution!

The stat. 39 El. c. 17., concerning *wandering* persons pretending to be *mariners and soldiers*, may in some measure be considered as a vagrant act, as to the particular persons who are the objects of it; and, indeed, contains some regulations in the spirit of that kind of police which had been established by the famous statute on that subject, of which we have before taken notice. The preamble of this statute recites, that many lewd and licentious persons wandered up and down in all parts of the realm, under the name of soldiers and mariners; and continually assembled themselves weaponed in the highways in troops, to the great terror of the people; and many murders and robberies were committed by them. It therefore enacts, that all idle and wandering soldiers and mariners, or idle persons wandering *as* soldiers and mariners, shall settle themselves in some service, or repair to the place where they were born, and take themselves to some lawful trade; and if they do not, they are to suffer as felons without benefit of clergy. Also, idle soldiers and mariners, who are really coming from the sea, if they have not a proper testimonial (as mentioned in the vagrant act), or if they exceed the time of their testimonial above fourteen days, or counterfeit, or knowingly have with them any counterfeit testimonial, it is made felony without clergy. However, this heavy punishment is so far alleviated, that the justices may, upon the conviction of such an offender, not proceed to sentence of death, if any honest person, approved by them, will engage to take him into his service for one year. This offence is cognizable before the justices in sessions. The act contains some other regulations respecting these kind of vagabonds.

Many outrages committed in the four northern counties occasioned stat. 43 El. c. 13., which enacts the pain of felony without clergy on all who concur in maintaining those disorders: such as carrying away persons, imprisoning; taking ransom for releasing them; spoiling or making a prey the person or goods, upon deadly feud, or otherwise;

taking money, corn, or other consideration, called there *black-mail*, for protecting persons against these outrages (as they were persons who in general were the head and maintainers of such offenders); or *the giving* of such money or other thing for protection; the burning any barn or stack of grain.

Having gone through such offences as touch the life of delinquents, we come now to those of an inferior class, though not less deserving of notice. The first that present themselves in this reign, of that kind, are the two statutes made in the fifth year of the queen against *perjury* and *forgery*.

Perjury.

The first of these is stat. 5 El. c. 9., an act made in aid of, and to enlarge, stat. 32 Hen. 8. c. 9., which had inflicted the penalty of 10*l.* on the *suborners* of witnesses. This fine was too small, and it was necessary to put a restraint also upon those who committed the perjury, as well as the procurers. It therefore enacts, that every person who shall corruptly procure any witness by letters, rewards, promises, or by any other sinister or unlawful *labour* or means to commit wilful and corrupt perjury in any matter or cause depending by writ, action, bill, complaint, or information, touching lands, tenements, or hereditaments, or any goods, chattels, debts, or damages, in any of the courts mentioned in stat. 32 Hen. 8. c. 9. before mentioned; (in the Chancery, Star Chamber, Whitehall, or elsewhere within the kingdom, or marches of Wales, where any person has authority to hold plea of land by the king's commission, patent, or writ, or to examine, hear, or determine any title of land or any matter, or witnesses concerning the title, right, or interest of any lands, tenements, or hereditaments,) or in any of the queen's courts of record, or in any leet, view of frank-pledge, or law-day, ancient demesne-court, hundred, or court baron, or in the courts of the stannery; or any witness sworn to testify *in perpetuam rei memoriam*, he is to forfeit 40*l.*; and if he has not goods or lands to that value, he is to be imprisoned one half year, and stand in the pillory an hour, in the place where the offence was com-

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mitted. He is also not to be received as a witness in any court of record, until the judgment be reversed. The person who corruptly commits wilful perjury in any of the above instances, is to forfeit 20*l.* and to be imprisoned six months; and his oath, in like manner, not to be received in any court of record, till the judgment be reversed. And if he has not goods or chattels to the value of that sum, he is then to be set on the pillory, and there to have both his ears nailed; *and thenceforth* to be discredited and disabled to be sworn, in any of the courts of record above mentioned.

As to the cognisance of this offence against the administration of justice; it is enacted, that as well the judge of every of the above-mentioned courts, where any such suit shall be depending, and whereupon the perjury is committed, as also the justices of assise and gaol delivery, and the justices of the peace in their sessions, may hear offences against this act by inquisition, presentment, bill, information, or otherwise. This act, sect. 11., is not to extend to any ecclesiastical court; nor to be construed to restrain the Star Chamber, sect. 13., in their jurisdiction over the same crime. This act is directed, sect. 10., to be proclaimed at the assises.

These are the provisions made in restraint of perjury, and subornation of it, by this statute; there is a clause also regarding witnesses, which is worthy of notice; it enacts, that persons served with process out of any court of record to testify concerning any matters depending in those courts, and having tendered, according to *his countenance* or calling, a reasonable sum for his costs and charges; and not appearing according to the tenor thereof, shall forfeit 10*l.*, and make further recompense to the party grieved as shall be awarded by the discretion of the judge of the court.

Forgery.

The statute 5 El. c. 14. repeals all former statutes against forgery of false deeds, sect. 11., and enacts several new provisions to punish this offence. It ordains first, that if any person shall falsely forge, or make, or cause or assent to be

falsely forged or made, any false deed, charter, or writing sealed, court-roll, or will in writing, to the intent that the *freehold or inheritance* of any one, in lands, tenements, or hereditaments, freehold or copyhold, or any right, title, or interest in them, shall be molested, defeated, recovered, or charged; or shall publish the same, and shall be convicted upon an action of forger of false deeds, or upon bill, or information in the Star-Chamber, he shall pay to the party grieved double costs and damages; to be assessed by the court where the conviction shall be; and shall also be set on the pillory, and there have his ears cut off, and his nostrils slit and cut, and seared with a hot iron: he shall also forfeit to the queen the profits of his lands during life, and suffer perpetual imprisonment.

If the same be done with intent to claim any interest for term of years, in any lands, tenements, or hereditaments, or an annuity in fee simple, fee tail, or for life, or years; or any obligation or bill obligatory, acquittance, release, or other discharge of a debt, action, demand, or other thing personal, or shall publish the same; such offender shall in like manner pay double costs and damages, shall be set on the pillory, and there have one of his ears cut off, and be imprisoned for a year, sect. 3.

The remedy given to the party grieved upon this act is, either by action of forger of false deeds by original, or by bill in the King's Bench or Exchequer. If by original, to have the same process as in trespass at common law, sect. 9. The second offence is made felony without clergy, with a saving of dower, and the corruption of blood.

Two other statutes remain to be noticed, one against fond and fantastical prophecies; the other for the punishment of the father and mother of a bastard child.

The former is stat. 5 El. c. 15., made in the same sessions, and standing next before that against witchcraft and conjuration, to which it may be considered as somewhat allied: it ordains, if any one do publish, and set forth by writing, printing, signing, or any other open speech or deed, any fond,

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fantastical, or false prophecy, by the occasion of any arms, fields, beasts, badges, or such like thing, accustomed in arms, cognisancy, or signets; or by reason of any time, year, or day, name, bloodshed, or war, to the intent to make any rebellion, insurrection, dissension, loss of life, or other disturbance within the realm; he shall be imprisoned for one year, and forfeit 10*l.*; for the second offence, to be imprisoned during life, and forfeit all his goods and chattels. The prosecution to be within six months. There had been an act of this kind made in the reign of Edward the Sixth (stat. 3 & 4 Ed. 6. c. 15.), which had expired; and the queen, whose apprehensions were greater on this point, than those of any of her subjects, was desirous of reviving some restriction upon such disturbers of her peace.

Punishment of the father of a bastard child.

The other, concerning the punishment of the father and mother of a bastard child, is a provision perfectly new. This is made by stat. 18 Eliz. c. 3., which ordains that two justices, one to be of the *quorum*, in or next the limits where the church of the parish is in which a bastard shall be born, may take order, as well for the punishment of the mother and reputed father, as also for the better relief of such parish; and may likewise take order for the keeping of the child, by charging the father or mother with payment of money weekly, or other sustentation: and if they do not perform the order, they are to be committed to the common gaol, except they put in sufficient surety to perform the said order, or to appear personally at the next general sessions, and to abide such order as the justices then and there shall take; and if they take no order, then to perform the order before made. But the bastards intended by this act are such only as are likely "to be left to be kept at the charge of the parish where they were born, to the great burden of the same, and in defrauding of the relief of the impotent and aged poor," as described in the preamble; and the statute, in the enacting clause, refers to it in the words "*such* bastards."

Of hue and cry.

Among other regulations of the police, the new order

made respecting hue and cry must not be omitted. This ancient method of pursuing offenders, at present stood upon two old statutes, the stat. of Winchester, 13 Ed. 1. st. 2. c. 1., and stat. 28 Ed. 3. c. 11. It seems this proceeding had of late been put in use more frequently than heretofore, and had therefore furnished many experiments of its defects, which it was now attempted to remedy. It was thought a hardship upon a hundred to be, in all events, liable to the party robbed; while the inhabitants had, perhaps, done every thing in their power towards pursuing the offender, in which the neighbouring hundred would not assist, by furthering the hue and cry, knowing that they were not concerned in making good the loss sustained by the party robbed. Again, the person robbed, confiding in the remedy he had against the hundred, would remit of any attempt or diligence in taking the offender. To remedy all this, it was enacted by stat. 27 El. c. 13. that the inhabitants of any hundred wherein there shall be negligence, or default of fresh suit, after hue and cry made, shall pay one moiety of the damages recovered; which contribution is to be recovered by an action at the suit of the clerk of the peace.

Again, because the recovery upon the two former acts used to be against one or very few of the inhabitants, who could not obtain by law any contribution from the rest, and were thereby often entirely ruined; it was now enacted, that after execution had, two justices within or near the hundred may assess rateably and proportionably all the towns, villages and parishes, hamlets and franchises, in the hundred towards an equal contribution; after which, the constable and headboroughs of such places shall tax the inhabitants within their district, to be levied by distress, and to be paid to the justices within ten days after collection. The same method to be followed within the hundred where there has happened default of fresh suit. Further, where one out of many offenders is taken by fresh suit, no hundred is to be liable. A hue and cry will not be sufficient

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to satisfy this act, unless it be made by horsemen and footmen. All actions against the hundred are to be brought within one year after the robbery; and no person is entitled to an action, unless he gave notice of the robbery to some inhabitant of the first village or hamlet nearest the place where the robbery was committed; and, unless within twenty days next before the action brought, he be examined before some justice, whether he knows any of the offenders; and if he does, he is to enter into a recognisance to prosecute.

CHAP. XXXV.

ELIZABETH.

Wardships. — Guardian in Soccage. — Grant of Entail to the Crown. — Prerogative of the Crown as to Mines. — Grants of reversionary Interests. — Leases. — Law of Descent in Fee-Simple. — The Use of a Term not executed by the Statute. — Of Trust-Terms, and other Trusts. — The Court of Chancery. — Judicature of the Master of the Rolls. — Executory Devises. — Covenants to stand seised. — Of Feoffees to a Use. — The Case of Perpetuities. — Scholastica's Case. — Law of Forfeiture. — Action of Assumpsit. — Actions by Bill in King's Bench. — Actions by original. — Of Ejectment. — The State of Learning. — Conveyances. — Law of Uses. — Provisoes, Effect of. — Pleading. — The Court of High Commission. — Criminal Law. — Murder and Homicide. — Of Manslaughter and Chance Medley. — Burglary. — New Commission of the Peace. — The Queen and Government. — Trial of the Duke of Norfolk and others. — Of Trials for Treason and other Offences. — Reporters. — Plowden. — Coke. — Law-Treatises. — Rastell. — Brooke. — Lambard. — Miscellaneous Facts.

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ELIZAB.

In the course of this long reign, the courts were called upon to determine questions of every kind; and many points of great importance were settled by solemn adjudication. It will be sufficient for the design of this work to select such as are more striking, and relate to those subjects whose history we have deduced in the preceding pages.

Wardship.

In the reign of Edward the Sixth, it had been held, as we are told in the case of Sir Anthony Brown, that where the son of one holding in knight's service was made a knight in the life-time of his father, he should nevertheless be in ward if his father died before he was of age: for otherwise the father might procure him to be made a knight

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by collusion, in order to defraud the lord of his ward; so that he agreed with the crown for his marriage. Though *Brooke* was of opinion it should be otherwise where he was made knight during his infancy and wardship; for then he thought he was within the provision of Magna Charta, c. 3. (2 Ed. 6. New Cases, 155.) This question was again brought forward in the case of *Sir John Ratcliffe*, in the early part of this reign. When called upon by the court of wards for the value of his marriage, that gentleman's counsel said, that as he was enabled to do knight-service by having received knighthood from the king, *who is the captain of all chivalry*, there was not the pretence of imbecility and inability of an heir within age to demand it; and as the cause did not exist, there was no reason for the effect of it to be made a burden upon the minor. And to enforce this, they cited the same provision of Magna Charta; from which, they said, it appeared that by the common law if the ward was made a knight during his nonage, he should be out of ward; and if it was the degree of knighthood which had this effect, there was the same reason for the exemption, if it was conferred in the life of the ancestor.

Upon this, the court took some time to consider the question; for though it had been frequently made, yet we are told by Plowden, that the parties had always compounded; so that the above case of Sir Anthony Brown seems not to be an adjudication, but only an opinion. But Sir John Ratcliffe would not compound, but demanded law and justice. As this was likely to be a precedent, the court were three years before they made a decree, by which they adjudged that no marriage was due to the queen. (6 Eliz. Plowd. 267.)

Guardian in soccage.

Some difficulty was found in the following case:—Lands descended on the part of the wife were settled by fine on the husband and wife, and the heirs of the body of the husband, remainder in fee to the heirs of the wife; the husband and wife die, leaving an heir under fourteen years; and there arose a contest between the grandfather on the part

of the father, and the grandmother on the part of the mother, which should be guardian in soccage. On account of the two estates, one in tail and one in fee, which descended, the court of ward saw some doubt in the question; and so took the advice of Lord *Dyer*, and *Saunders*, chief baron, who were of opinion, that the ward of the body belonged to the grandfather, on the part of the father, who was likewise entitled to the guardianship of the soccage land. (*Carrell* v. *Cuddington*, 7 & 8 Eliz. Plowd. 295.)

The interest of a guardian in soccage was esteemed to be for the benefit of the infant, and not of the guardian; so it did not go to executors, nor could it be forfeited to the king. It was upon this reasoning determined in the King's Bench, that when the husband of a guardian in soccage intermeddled so far as to join in making a lease, the widow, after his death, might enter, and avoid it. (*Ostern* v. *Carden*, 7 & 8 Eliz. Plowd. 293.)

Grant of entail to the crown.

It seems strange, that so many years after the stat. *de donis*, it should be agitated, as a matter of doubt, whether land could be entailed in the king and his issue under that act. But so it is, that this point was contested in the fourth of the queen, in the famous case of *Willion* v. *Berkeley*. A Lord Berkeley had granted lands, with remainder to Henry the Seventh, and the heirs male of his body, with remainder to his own right heirs. Henry the Eighth made a grant of the land for life; and then Edward the Sixth granted the reversion in fee: and now, upon the death of Edward the Sixth, without issue, it was apprehended the estate-tail was extinct, and that the remainder should take effect in possession; and, after much argument, it was held by the court of Common Pleas (that is, by Lord *Dyer* and *Anthony Brown*, the other judge not being present), with the dissent of *Weston*, that it was an entail in the king, and not a fee-simple conditional at common law, as had been contended.

But *Weston* argued, that the rule respecting grants to the king was exactly the reverse of that which applied to

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those of common persons; for all grants to the king were to be construed most strongly in his favour, and against the grantor. Thus, if part of a thing entire came to the king, the law gave him the whole; as if one of two obligees is outlawed, the king has the whole duty. If one grants to the king all the presentments that shall happen within twenty years; if a stranger presents to all that happen within that time, the king, after the twenty years, should have all the presentments. And many other instances were stated, which showed that the king enjoyed, by his prerogative, a power to take things in a different way than the common course of the law disposed them. He also showed many instances where the king should not be bound by a custom by which others were bound: thus a sale of his goods in market overt could not bind the king. And as neither the common law nor custom could restrain the king's prerogative, so should not a statute which did not mention the king in express terms. Though he might take advantage of statutes in which he was not named, as of the Statute of Waste, and many others; but statutes that restrain shall not affect him, as the Statute of Magna Charta, c. 11. ordains that Common Pleas shall not follow the court, but be held in a certain place: yet in 31 Ed. 1., where he brought a *quare impedit* in the King's Bench, and the above provision was objected, the actions were held to lie by the king's prerogative. So the Statute of Limitations, 32 Hen. 8., does not bind the king. And many other instances he quoted, where the king was exempt from the restraint of statutes, because he was not mentioned in them.

From this he inferred, that the statute *de donis* was not to bind the king, for that was restrictive in three points: it restrains alienation; it prevents the second husband from being tenant by the curtesy; and it diminishes the estate of the donee; and all this without any mention of the king. Again, in this case, the entail is by the equity of the act, and not by the express words of the statute; and no statute shall be taken by equity against the king,

though it may against the subject. Further, the statute only restrains the donee, and not the issue; and it is only by equity of the act that the issue are restrained; and such equity shall not operate against the king. And as no præcipe lies against the king, no recovery could be suffered by him, so that he would be worse circumstanced than other tenants in tail. These were the considerations which weighed with the learned judge for dissenting from the judgment given by his brethren.

It was held by the same judge, that in the present limitation, the estate was in the king in his body natural; for no heirs, but such as are begotten by the body natural could inherit under this limitation; but notwithstanding that, yet his body politic was so united to the body natural, that there could not be properly a distinction; but the king, as to this estate, should enjoy all the prerogatives, to which he was entitled in his politic capacity. This had been laid down as the groundwork of the above argument. This was agreed by the other side; but they insisted, that in gifts of land to the king, the person was not to be considered, but only the estate in the land, and that alone was to govern. Thus a fee-simple conditional might be given to the king before the statute, and he could not alien in fee before issue had; for it would be a wrong in any other person, which was not warranted by his prerogative. And though they admitted, that in some cases the quality of things was altered in respect to the person of the king, as the descent of land to the eldest of his daughters, and some others, yet on the contrary in some cases; if gavelkind-land descended to him and his brother, each should have a moiety; but the king's eldest son should take the whole of his moiety. But in fees conditional, they said the estate was the same in the king as in another person. And, as to the act, supposing it to be law that the king is not to be bound by it, unless named, they said he was named; for it says, *wherefore the lord the king perceiving how necessary and useful it is*, &c., by which it appears, that the king

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saw the mischief, and ordained the remedy; and it would not be reasonable that he should wish to be at liberty to continue the mischief himself; but he certainly meant to be bound by an ordinance, so remedial as this; and if he was not, the whole intent of the donor, in this case, would be disappointed; and the will of the donor ought now to be as a law, as well against the king as any other person. They further argued, that the king by claiming to hold contrary to the statute would destroy his own estate; for if he said his estate tail was a fee-simple, so would the preceding tail be; and then his fee could not be limited on the former, but would be void; and to say the one was entail, but the other in fee; that is, to affirm the operation of the statute as to one, and not as to the other, would be a construction not to be endured; and he should be stopped by the rule, *qui sentit commodum, sentire debet et onus:* and it would also be partly destroying the fine, upon which his own estate depended, for it would make void the remainder in fee to the right heirs of the Lord Berkeley. And they took it to be implied by the decision in 4 Hen. 6. (4 Hen. 6. 19.) and 22 Ed. 4. that the king is bound by the statute, the same as a common person, and expressly by 7 Hen. 4. c. 2. where an estate tail is adjudged not to be forfeitable for treason. And *Anthony Brown* quoted the case of his own father, whose land being seised for the king's debt was discharged, because it was entailed; for the king was not at liberty to say, that as to him the estate should be construed a fee-simple conditional. And Lord *Dyer* thought it clear that the justices who took the fine, thought it a fee-tail, or it would have been idle to suffer it to pass; and those were men of great learning; and were, *Brian, Townsend, Davers,* and *Vavisor.* (4 Eliz., Plowd. 241.)

The distinction between the natural and politic body of the king was made a subject of consideration in the case of the Duchy of Lancaster, which was considered this same year at Serjeants' Inn, by several justices, serjeants, and counsellors of that court. The question there was, whe-

ther a lease of Duchy lands made by Edward the Sixth, was not void for his nonage. This led to an enquiry into the nature of annexation of the Duchy to the crown; the history of which it set forth with great precision and clearness. After considering the establishment and alteration of the connexion and separation of this great franchise from the crown, by Henry the Fourth, Edward the Fourth, and lastly, by Henry the Seventh; and though some did not agree to the exposition of the stat. Hen. 7., which supposes the Duchy not to be separated in inheritance and right from the crown, and not devested out of the body politic of the king, and vested in his body natural, as some of them held it to be; yet they all agreed, except *Ruswell* the solicitor to the queen, that the king's person shall not be invalidated by the Duchy being given to him and his heirs by that act; but he remains always of full age, as well in regard to gifts and grants of lands made by him, as in the administration of justice. At a subsequent argument upon this point, in the Duchy court, it was agreed by all present, that king Henry the Seventh had the Duchy in his body natural, as Henry the Fifth had it, disjoined from the crown, and not as Edward the Fourth had it: and this was by reason of the statute of Henry the Seventh. (Plowd. 221.)

Prerogative of the crown as to mines.

In the famous *case of Mines*, an important article of the royal prerogative, was settled after it had been passed over by the statute *de prærogativâ regis*, and all the old treatises upon the law. This case depending in the Exchequer, and was referred to the Exchequer chamber; where, in the tenth year of the queen, it was resolved by all the justices and barons, on the authority of old grants and of long usage, that, by law, all mines of gold and silver, within the realm, belonged to the crown by prerogative, with liberty to dig and carry away the ore, and all the mirdints necessary for getting the ore: again, it was agreed by *Harper*, *Southcote*, and *Weston*, that if gold or silver be in ores or mines of copper, tin, or other base metal, the whole of the precious and base metal belong to the

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subject in whose soil it is found, if the former does not exceed the value of the latter; for if it did, then the crown should have both; and it should be called a mine royal. But all the other justices and barons were of opinion, that both belonged to the crown, though the gold or silver was of less value than the base metal; and should be called a mine royal; for they said, the records made no distinction as to the value of the metals; the extent of this opinion was qualified by act of parliament in later times. (1 W. & M. c. 30., and 5 W. & M. c. 6. Plowd. 336.)

Grants of reversionary interests.

The point which had been decided in the last reign, in *Throckmorton* v. *Tracy*, that a grant of a reversion *habendum* for years, was a good lease of the land for years, was recognised and confirmed in *Wrottesley* v. *Adams*, in the beginning of this reign; and further, they adjudged, that though the declaration varied from the deed, and had stated it as a grant of a reversion, *habendum the reversion* for years; yet it was the same thing. But the principal point in this case was this, the reversion was granted for a term of years, to commence *after the end and expiration of the first term for years;* and the first termor having accepted a lease for life, which was in law a surrender of the first; it was contended, this was not such an end and expiration of it, as should give commencement to the second lease for years. And the court held, that *term* was the emphatical word, and not *years;* and the term or estate might cease, though the years were not elapsed, as in the present case; and so they held the second lease should commence upon this constructive determination of the former. (1 Eliz. Plowd. 198.)

We have seen the difficulty the courts had in pronouncing upon running-leases; these were still continued in various shapes; and wherever a lessor was contented with his lessee, it was a very desirous mode of tempting each party to conduct himself to the satisfaction of the other. A lease of this sort was brought in question in 6 El. in the case of *Say* v. *Smith:* a lease was made for ten years, and the lessee covenanted, at the end of the ten years, to pay 10,000 tiles, or the value of them in money, as a sum in

gross; and further, the lessor covenanted, "if the lessee and his assigns would pay to the lessor and his assigns *the said* 10,000 *tiles*, or their value in money, at the end and term of every ten years, from thence next following, that then he and his assigns should have a perpetual demise *from ten years to ten years continually*, and ensuing out of the memory of man; at the rent of four pounds." It was the opinion of the whole court of Common Pleas, that there was no lease beyond the first ten years for want of certainty. It was said, that this being a lease to commence on condition, that should be performed, before the lease could commence. And Lord *Dyer* said in the case in Littleton, of a lease for years, upon condition that, if the lessee does such an act within the two first years, he should have the fee-simple; he should not have the fee till he had performed the condition, and Littleton's opinion to the contrary was not law. So here, after the first ten years, a condition is to be performed before a lease can arise; and it must be seen whether this condition can be performed at all; and they argued that it could not. For, they said, by the words of the covenant, he ought to pay the tiles every ten years following, which would be to the end of the world; again, they were to be the *said* tiles; now the same tiles could not be paid twice over, therefore, they concluded, as every ten years to the end of time must first elapse, and as the same tiles must be paid over again, these were conditions that could not be performed: and so no lease took place after the first ten years.

As they were pleased to adjudge for the above reasons, that this lease wanted a certain commencement, they also thought, for the following, that it wanted a certain continuance. For a demise from ten years to ten years (if it had stopped there) would have been a good demise for twenty years; but from ten years to ten years continually out of the memory of man, contains time without a term; and so does not come within the legal idea of a term for

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years. So they agreed in adjudging this to be no lease after the first ten years. (Plowd. 272.)

On this occasion the judges delivered their opinions upon several leases of this arbitrary kind. They said, that certainty was what was absolutely required in all leases for years; and some of these running leases were good, if any certainty could be made out. Thus a lease for ten years, and so from ten years to ten years, during one hundred years, was held good. If a lease was for three years, and so from three years to three years, during the life of *T. S.*, this, they held, to be only good for six years; for the second three years was as much as to say, from the first three years during other three years, which was certain; but afterwards it is all uncertainty; and *Brown* said, it had been so adjudged. *Dyer* said, in his memory, it had been adjudged in that court, that a lease of a parsonage for five years, and so from five years to five years during his life (which was their common way of leasing), was good for ten years, and no longer, though the lessor continued parson; because there was no certainty. (Plowd. 273.)

Leases.

The case of *Bracebridge* v. *Cooke* was where a lease for years was made by a man, and the lessee granted the term to the lessor's wife and a stranger, and the wife died. And it was adjudged that the stranger should have the whole by survivorship; for the joint-tenancy was not dissolved by a merger of the term in the husband's inheritance. (Plowd. 417.) And in another case, which arose from part of the same transaction, it was adjudged, where a lease is made for forty years, if the lessee lives so long, and afterwards the same land is leased to another without deed for seventy years, this is a good lease; for as many years as shall remain after the first term ended either by the death of the lessee, or by effluxion of time, and is but executory till the end of the first term, and not executed. And such second lease is good, though made without deed. (*Bracebridge* v. *Clowse*, Plowd. 420.)

The nature of leases which were to commence or deter-

mine, on a contingency was much agitated in the *Rector of Cheddington*'s case, in 41 El. There a demise was made of a rectory to *Elizabeth usus ad finem et durante termini* of eighty years, if she so long lived; and if she died, or aliened the land *infra præd. terminum* of eighty years, then her estate should cease. And the rector demised the land for as many years as were unexpired after the death or alienation of *Elizabeth* to *Ralph*, *pro et durante præd. termino* of eighty years; and in the same manner, upon the same contingency, to *William*; and then to *Thomas*, *pro et durante tot annis* of the eighty years as shall remain unexpired. Afterwards *Thomas* died, then *William*, and then *Elizabeth*; then *Ralph* entered into the land, and the question of title arose between him and an assignee claiming under the administratrix of *Thomas*. And it was resolved, that the lease to *Ralph* and *William* was void, because there could not be a residue of the term after her death, as it was, by express limitation, to expire by that event. But they held the demise to *Thomas* to be under different circumstances, because it was not *de præd. termino*, but *de præd.* eighty years. Notwithstanding this, it was argued against the demise to *Thomas*, which they said was void, because the lessor had only a possibility, namely, if *Elizabeth* died, and that was not such an interest as could be demised; but on this the court gave no opinion, but they resolved the lease to be void for the uncertainty: for it was uncertain how many years would remain at the death of *Elizabeth*; and, further, by *Thomas*'s death during the life of Elizabeth, the uncertainty at the commencement was not reduced to any certainty during the life of *Thomas*; for it depended upon a contingency precedent, and till that happened, the interest or term is not certain, nor is the land bound by it: the lease, therefore, which never took effect, cannot rest in his administrators; and supposing he had survived *Elizabeth*, the lease would have been void, because it was not to commence unless *Ralph* died before *Elizabeth*; but as he survived her, the lease to Thomas could never commence.

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(So it ought to stand; but in *Coke* the whole of this part of the argument is confounded and wrong, by the mistake that *William* and *Ralph* both survived *Elizabeth*, when by the state of the case it appears that *Ralph* was the only survivor. 1 Rep. 156.) And, further, it was said by *Popham* (though this was no part of the decision of the court), that another reason for the lease being void was, that it could not commence upon a contingency, which depended upon another contingency, as that the demise to *Thomas* depended on the contingency annexed to the demise made to *William*, and the demise to *William* depended upon the contingency annexed to the demise made to Ralph. (1 Rep. 153.) But this rule has not been admitted for law in later times.

It was an important decision that declared executors of executors should be comprehended under the description of assigns to the first testator. The case was, that *A.* and his wife leased to *B.* for twenty-one years, and covenanted with *B.* and his executors that at the expiration of the term they would make another lease for the same term to the said *B. and his assigns. B.* dies, having made his executrix; and she dies, leaving an executor; and then the term expiring, the executor brings covenant against the lessors for a renewal. This was the case of *Chapman* v. *Dalton;* and it was argued in the King's Bench, with some show of reason, that the action would not lie.

It was said that the death of *B.* had rendered the covenant impossible to be performed; for the lease was to be to *him and his assigns*, which was *habendum* to him and his assigns, a limitation that could not now be made; though, perhaps, if it had been in the disjunctive (*or* his assigns), it might be performed after his death, if he had named a person in his will to whom it should be made; that is, an assignee in deed, and not one in law, as an executor is. And further, it was contended, that if an executor was such an assignee, yet an executor of an executor could by no means be such; for by the common law, they were considered as mere strangers, and not privy to the will of the first

testator, nor able to bring any actions concerning his property; which was remedied by stat. 25 Ed. 3. c. 5. And in addition to the above reasoning, *Wray* contended, that as this act gives only debt, account, and an action for goods carried away, the present action of covenant was not warranted by it. And further, he said, if the lease was made to the plaintiff, he would be a purchaser, and would not have it to the use of the first testator, as it would have been if granted to *B.*; which he thought an additional reason why the plaintiff should be barred.

On the other side it was answered, that in every gift or covenant the words shall be taken most strongly against him who makes it, and most strongly for him to whom it is made, and so must the word *assigns* be construed here. If it is construed as a word of limitation, it would be a word of abundance, and merely void; for which reason, another sense must be found out. And it has two senses: one where it signifies the person to whom a thing granted shall be granted by the person who has it,—as a grant in a lease, that the lessee and his assigns should have such quantity of wood, means the person to whom the lessee shall assign the lease; but this is not the present case. The other sense is, where it means the person *to whom* a thing shall be done which is not yet done. As a condition to give you or your assigns a horse, there assigns are such persons as you shall appoint to receive the horse. Then again, both these assigns are either in deed or in law those whom the party appoints, or those whom the law appoints, as executors; for they represent the person of the testator in personal things, and so are his assigns in law. So in the above case of the horse, the executor is the person to receive it, if no other is appointed. And by 27 Hen. 8. it appeared that the law was so held.

And those who say that the lease should be made to *B.* as well as to his assigns, because of the copulative *and*, they said this was one of those bad expositions that destroyed the text; for it would be the same as saying, that were *B.*

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alive, the lease should not be made to him solely, but to him *and his assigns;* so that his assigns must take jointly with him, and the lease could not be made till he had appointed an assignee; but this would be mere nonsense, for then his executors must be joined with him: but, instead of construing this a joint estate to *B. and his assigns*, the copulative *and* should here, as in many other instances in the law, be taken for the disjunctive *or*. And the sense is to make a lease to *B.*, if he is alive, and *if not*, to his assignee, namely, his executor.

The objection that the executor of an executor is not the executor to the first testator, they said, was equally ill founded: for if I give authority to my bailiff to sell my sheep, this is my sale by him. And, in like manner, when a man makes his executor, it is thereby implied, that if the executor dies, the second executor shall be executor to the first testator; for he is appointed by the first executor to whom the testator intrusted such appointment; he is, therefore, immediate executor to the first testator, and stands entirely in the place of the first. And so it was held before the stat. 25 Ed. 3., for that act was only made to give account and an action for goods taken; but the action of debt need not have been put in the statute, for executors of executors might have had that at common law, as appears by a case in 10 Ed. 2. (Fitz. Executors, 110.); though as many doubted thereof, it was well to insert it in the act. Thus executors of executors might have all actions which the common law gave to the first executors, and so might have covenant; but if not, yet they now may by equity of stat. 25 Ed. 3.

But the reasons upon which the judges declared they rested their opinion were the following: It was said, that admitting *assigns* to be a word of limitation, and so void, or admitting it to be out of the covenant, then it is that a new lease shall be made to *B.*; and taken thus, they contended the lease should be made to the executor of the executrix. For in all agreements the chief point to be considered is the

intent; and if by the act of God, or other means, it cannot be performed according to the words, yet it shall be performed as near to the intent as possible. Now the intent here was that a new lease should be made, and to *B.*; and if *B.* was dead, then the lease was still to be made, and to whom but to those to whom it would go, if it had been made to *B.*, namely, his executors, the lease, and not the lessee, being the principal consideration in the agreement. As this lease was to be made twenty-one years after the agreement, the parties must have foreseen the probability that *B.* might not be alive at the time, and so could not mean the covenant should be dissolved by his death: it can make little difference to the lessor whether he made the lease to *B.* or his executors; then it comes within the common rule that agreements and conditions shall be performed according to the intent, if the words cannot be followed. To which purpose is that case in Littleton, of a condition to make an estate in special tail to the feoffor and his wife, and the heirs of their two bodies, and the husband died before it was performed: there it was his opinion the condition would be fulfilled, by making an estate to the wife for life without impeachment of waste, remainder to the issue in tail, according to the first limitation; and if both were dead, then it ought to be to the issues and the heirs of the body of the father and mother (Litt. § 352.); and many similar instances were put from that author, and elsewhere, on the performance of conditions in this way.

They denied what had been alleged, that the lease made to the plaintiff would not be assets, for the covenant being made to the testator, every benefit derived from the performance of it shall be possessed as the covenant; so that he shall have the lease in the same manner as he had the covenant, namely, in right of the testator.

The justices met at Serjeants' Inn to consider the judgment to be given; and they unanimously agreed that the action was maintainable: and though no solemn opinion was given by the judges, the Chief Justice *Catline* said, as

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has already been observed, that the principal reason which satisfied them was that given in the last argument. (7 Eliz. Plowd. 286.)

A case happened some time afterwards, where an executor devised a term that he took as executor, and the law was thus laid down by all the justices of the King's Bench, namely, that the devise was void; for as soon as he is dead, it goes to the use of the first testator, and his executors have it as executors to the first testator, and to his use, and not as executors to the last testator, nor to his use. For the goods of the first testator shall not be put in execution for the debt of the last testator, and the last executors have them by relation as immediate executors to the first testator. Yet the executor had the disposal of them in his life; but that authority ceases with his life, and is transferred to his executors, who, however, hold them, not as his executors, but as executors to the first testator; and the devise being void, the assent of the executor was void also. The Chief Justice *Wray* said, he had spoken with several of the justices of the Common Pleas, and they agreed that the devise was void. (20 Eliz. Plowd. 525.)

In the course of our historical enquiry into the changes in doctrines and opinions, there are few heads of law that have not become the subject of frequent controversy: the principles of the old common law have been frequently altered and modified, they have been varied by statute and overruled by the courts. Statutes made to remedy difficulties have become the source of new ones, and have occasioned other statutes to correct and amend them. Every rule for the government of property has, at one time or other, been disputed; every remedy for the recovery of it has been the subject of difficulty and doubt; and men's voluntary contracts for the exchange of property have furnished endless contests in our courts. Through all these changes and revolutions there is one title in our law which seems to have enjoyed a singular exemption, and that is, "the law of descent in fee-simple." The

mode in which these common law estates were to pass from ancestor to heir was settled upon principles so clear and defined, that it has seldom become the subject of judicial decisions. There are few cases of this kind in the books; and we are informed by the reporter that, in his time, he did not know two cases upon inheritances and escheats. (Pref. 4 Rep.)

One of these rare instances happened in the 15th of the queen, in the case of *Clere* v. *Brook*, where the law of inheritances was spoken upon very fully in order to settle the point there in dispute. The question was simply this: *Clere Hadden* dying without issue, whether the remainder in fee, which he had by purchase, should descend to *Young*, the heir of the grandmother, on the part of the father, (inasmuch as he had no other heir on the part of his father, nor on the part of his grandfather on the father's side,) or should descend to *Clere*, his uncle, and next heir on the part of the mother. To make this case, and some points which arise in it, clearer to the reader, I shall refer to the commentaries which are in the hands of every body; and it will appear, in the table of descent, that the question was between No. 11. and No. 14.

Before the court came to consider the principal point in this cause, they previously agreed upon certain points, which, being once admitted, might furnish a ground on which to argue and to decide. These were nothing more than what were very well understood before, and were to be found, either in words or in effect, in some of our oldest law books. These points were agreed by the court and the counsel on both sides, and were three in number.

The first point was, that in collateral descent from a purchaser who dies without issue, the heirs on the part of the father, who are of the blood of the male ancestors in the lineal ascent by the father, shall be preferred before the heirs who are of the blood of the females in the lineal ascent by the father, in one and the same degree. Thus the brother of the grandfather to the brother of the grand-

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mother, that is, No. 8. to No. 11.; and so the brother of the great grandfather before the brother of the great grandmother, that is, No. 9. to No. 10. And the same holds with regard to the brother of the great-great grandfather, and the brother of the great-great grandmother.

The second point was, that if the purchaser died without issue, and had no heir on the part of the father, the land should descend to the next heir on the part of the mother, which meant the heirs of the race of males from whom the mother descended, in preference to the others. Thus the brother of the grandfather of the mother of the purchaser shall inherit, in preference to the brother of the grandmother of the purchaser, that is, No. 16. to No. 17. For the brother of the grandfather (as in the former case) is more worthily descended, being of the great grandfather's line. And in confirmation of this descent to the heir on the part of the mother, on default of heirs of the purchaser on the part of the father, they cited Littleton, sect. 4., and 49 Ass. 4., and 12 Ed. 4. 14.

The third point was, that if a purchaser has issue a son, and dies, and the son enters and dies without issue, or heir on the part of his father's father, the heir on the part of his father's mother shall have the land, and for this they quoted 12 Ed. 4.; but *Loveless* said, in such case the heir of the part of the mother of such issue could never inherit; in confirmation of which was stated at length a case from 39 Ass. 30., and the case of *Carell* v. *Cuddington*, which we shall have occasion to consider in another place; for he said, as long as the land continues in descent, it shall taste of the first purchaser, and to his blood only shall it have respect, and not to the blood of any woman who may be married to any of the issue. So that, in point of descent, no marriage is to be respected but that of the father and mother of the purchaser.

But the great doubt, after these points were agreed on, was, whether there was in being any heir on the part of the father of *Clere Hadden*. And it was contended that the

plaintiff *Clere* was nearer in descent than *Young*, for the plaintiff was uncle on the part of the mother, and *Young* is in a remoter degree than the plaintiff and *Clere*; and Littleton says, that the next cousin collateral shall inherit, so that proximity of blood was to be considered. And they said, true it was that *Young* was descended on the part of the father, but it was on the part of a female; namely, the grandmother of the purchaser, and as much a stranger to the blood of the *Haddens* as the mother of the purchaser; and so, being equally strangers, it seemed reasonable to prefer the nearest. And so material did they conceive the proximity of blood to be, that they thought the law would countenance it to prevent plurality of claims.

To this it was answered, on the other side, that the plaintiff and *Young* not being in one degree of blood to the purchaser, proximity is not to be regarded. But the blood between the plaintiff and *Clere Hadden* came immediately from a female; but that between *Young* and him, though from a female, was derived through a male, namely, *Clere Hadden*'s father, and, on that account, more worthy; so that *Young* is of the blood of the father of *Clere Hadden*: and *Littleton* says expressly, *all of the blood of the father* shall inherit before they on the part of the mother. And he showed that *Bracton* makes the brother of the mother of the father of the purchaser to be heir to the purchaser before the brother of the purchaser's mother, which is a decision of the very point; and of the same opinion were the whole court.

In answer to that part of the argument where it was suggested, that much confusion would follow if proximity of blood was not suffered to govern, it was observed by *Manwood* Justice, that no confusion would happen if the more worthy in blood was preferred; but if they were equally worthy, then the nearest should be preferred. For if the contest was between the brother of the purchaser's father and the brother of the purchaser's grandfather, that is, No. 8. and No. 9., the former should be preferred; be-

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cause, being equally worthy in blood, that is, in the lineal ascent of males, the nearest should be preferred. And for the same reason, he said, the brother of the purchaser's grandmother shall be preferred before the brother of the purchaser's great grandmother, that is, No. 11. before No. 10., for they are equally worthy in blood, he says, (for such heirs come from the blood of the female sex from which the purchaser's father issued) and so the nearest is to be preferred. But, on the other hand, the brother of the purchaser's great grandfather shall be preferred to the brother of the purchaser's grandmother, that is, No. 9. to No. 11., because, though less near, he is more worthy; for his blood accrues by male blood throughout; for he was son to the purchaser's great-great grandfather, while the blood of the other only accrued by a female. And this was extending the doctrine contained in the first point resolved before, for there this preference is not carried further than where they are "in one and the same degree."

In the second of these positions, where the brother of the grandmother is preferred to the brother of the great grandmother, that is, No. 11. to No. 10., the learned judge was not followed by some lawyers who were present at the time it was delivered; but they thought the brother of the great grandmother should be preferred, because his blood is derived to the purchaser by two males, namely, the father and grandfather; whereas that of the other is derived only by one, and the grandfather was not of the blood of the brother of the grandmother, but of the brother of the great grandmother, and therefore more worthy. Upon these considerations it was that *Plowden*, as he tells us, again put the question to *Manwood*, in the presence of *Harper*, another of the justices; and they both expressed themselves clearly in the same opinion, and said it must be so, on account of the proximity, which holds place on the part of females conjoined by marriage to males, where such blood is once derived by a male to the first purchaser. And when, at another time, *Plowden* suggested the same doubt to

Lord *Dyer*, he was of the same opinion with the other two; so that this, though no part of the cause, was agreed by all the justices of the Common Pleas. [*Plowden*, in the translation, is made to say, only, *Dyer*, *Manwood*, and *Harper* — which is not all the judges. — See the original, if *Harper*, *another justice*, is not *Harper* AND *another justice*.] This position has been examined by later writers; among whom the author of the Commentaries has given eight very cogent reasons why it should not be admitted for law; one of which is, that it establishes a doctrine incompatible with the point adjudged in this very case. (Black. chap. Descent, p. 233.) For the principal reason that governed in this decision was, that the blood of *Young* was conveyed to the purchaser by a male, which the blood of the mother's brother was not; so that this new idea of proximity entirely militates with that which they recognised and followed in this adjudication, the preference of the male blood, and tends to all the uniformity and coherence in the law of descents.

Use of a term not executed by the statute.

Another check was now given to the statute of uses, by a determination at common law. It was solemnly agreed by all the judges in the Exchequer chamber, upon a point referred to them by the chancellor, that the statute does not execute the use of a term. The case was this: *A.*, possessed of a term, granted all his estate and interest to *B.* and *C.* and their assigns, to the use of *A.* and his wife; afterwards *A.* gave to a stranger such interest as he had in the lease; and it was held that nothing passed by such gift, there being no use executed in him. (23 El. Dyer, 369.) This was supposed to be supported by the words of the statute; which, as it only mentions such persons as were *seised* to the use of others, was held not to extend to terms for years, or other chattel interests of which the owner is not *seised*, but only *possessed*.

This was the opinion of the judges on the point, as a question of law: nor does the reporter take any notice how it was afterwards treated by the chancellor, as to the equity of the case, which might call upon him to do that which a court

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of law would not venture upon. However, it appears that the court of Chancery had taken upon itself to allow relief in like instances, where the courts of common law had been over-strict in their construction of the statute; and, under the name of *trusts*, gave efficacy to such gifts as the judges would not consider as *uses*. This seems to have prevailed to a great extent in this reign, and to have been generally admitted, and tolerably well understood by the lawyers of the time. In *Witham's* case, in Chancery, where a term for years was granted to the use of a feme sole, who took a husband, and died, it was there made a question whether the husband should have the use, or the administrator of the feme; and it was resolved, that the administrator should have it, and not the husband; because this *trust of a term* was a thing in privity, and in nature of an action, for which there was no remedy, but by *subpœna*; and it was then said to have been so determined in a case which happened in the eighth year of this reign. (32 El. 4 Inst. 87.)

Of trust-terms,

and other trusts.

Indeed, the doctrine of trusts seems to have thoroughly established itself; for, in 42 & 43 El. in *Sir Moyle Finch's* case, we find the judges, to whom it had been referred by the queen, to reconsider the chancellor's decree, not confining themselves to the mere point of law, as formerly; but entering on a full discussion of the very matter of equity, as it was opened to the chancellor; and treating it as a system of learning which had already grown to some size, they resolved the following general rules of equity: 1st, That a disseisor was subject to no trust, nor could any *subpœna* be had against him, not only because he was in the *post*, but because the right of inheritance or freehold was determinable at common law, and not in Chancery; that *cestui que use*, while he had his being, had no remedy in such case. 2dly, That a trust could not be assigned, because it was a matter in privity, and in nature of a chose in action; for he had no power over the land, but a remedy only by *subpœna*, unlike a *cestui que use*; for he had a *possessio fratris*; might be sworn on juries; and after stat. 1 Ric. 3. had the disposition

of the land. And it was said, if a bare trust or confidence might be assigned over, great inconvenience might ensue by granting it to great men. And to discourage endless enquiries of this kind, it was the opinion of some of the judges, that if a man make a conveyance, and declare a use, the party himself, or his heirs, shall not be received to aver a secret trust, unless such trust appear in writing, or otherwise be expressed by some apparent matter.

Besides these resolutions upon the nature of this new species of property, called trusts, they agreed that when any title of freehold, or other matter determinable at common law, arose incidentally in equity, it should be referred to a trial at common law, where the party may be relieved by error, attaint, or an action of a higher nature; and where a suit is for evidences, there, if the defendant, in his answer, make title to the land, the plaintiff ought not to proceed; for otherwise, by such a surmise, matter of ordinary cognisance would be enquired of in equity. (4 Inst. 85.)

The power of this court to determine on resulting trusts, was strongly debated in 39 & 40 El., a cause where *Sir Moyle Finch* was the defendant, and had pleaded a judgment in ejectment, and demanded whether he should be put to answer any surmises that invalidated a judgment recovered at law. The *Lord Chancellor Egerton* was of opinion that he should answer the bill. And the queen afterwards referred the consideration of the demurrer to the judges, where it was argued, that the proceeding in Chancery was not to impeach the judgment; but having admitted the validity of it, to relieve upon equitable considerations arising thereon. If a man, said they, has two matters to aid him, one at law, and one in equity, upon failure in his suit at law, he may, notwithstanding judgment there against him, sue to be relieved on a collateral matter in equity; and they showed many forcible precedents to this effect in the reigns of Henry the Eighth and Edward the Sixth. (Crompton, 58 b.) But, after great consideration of the point, it was resolved by all the judges that the plea was good, and that there should be no

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further proceedings in equity: for, though the chancellor would not (as hath been said) examine the judgment, yet he would by his decree take away the effect of it. And as to the precedents quoted from the preceding reigns, they were treated without any regard, as founded on the sole opinion of the chancellor, and passing *sub silentio*. They termed it not only an inconvenience, but directly against the laws and statutes of the realm, (namely 27 Ed. 3. c. 1. and 4 Hen. 4. c. 22.) against which no precedent can prevail. (4 Inst. 86.) From this it is plain, that the court of equity in Chancery was kept in strict subordination to the courts of law; and whenever it happened that they had been making precedents of a new and extraordinary kind, they received a check and animadversion, which stamped every thing in that court with the name of innovation and abuse, that had not received a sanction from the judges. Maxims of equity were formed, in this manner, under the control of the common law, and were rarely applied but in analogy to some pre-established course of legal redress. This was likely to continue while the present order of appeal continued. An appeal from a decree or order of the chancellor was, by petition to the queen, who used to refer the consideration of it to the judges, a course of proceeding entirely conformable with the nature of this equitable jurisdiction, which, being derived originally from the king in council, was properly amenable to that tribunal in all instances of error or misconduct.

The court of chancery.

The strongest inclination was shown to maintain this opposition to the court of equity, not only by the courts but by the legislature. The stat. 27 El. c. 1. which, in very general words, restrains all application to other jurisdictions, to impeach or impede the execution of judgments given in the *King's courts*, under the penalty of a *præmunire*, has been interpreted as well as stat. Ric. 2. c. 5., not only as imposing a restraint upon popish claims of judicature, but also of the equitable jurisdiction in Chancery; and in the thirty-first and thirty-second years of this reign a counsellor at law was indicted in the King's Bench on the sta-

tute of *præmunire*, for exhibiting a bill in Chancery after judgment had gone against his client in the King's Bench. (Crompt. 57, 58.)

Under this, and the like control, the court of Chancery still continued to extend its authority, supported, in some degree, by the momentum it acquired in the time of Cardinal *Wolsey*. The objects of examination there had considerably increased of late: the statute of uses had given rise to *trusts*, which general term also comprehended infinitely more than had formerly come under the appellation of a use; and took in every just claim and equitable right to property, which was not substantiated by an assurance, or in some legal way. The nature of conveyancing now practised contributed to increase such claims and rights. The direct conveyance by feoffment, which caused an immediate transmutation of possession, had long gone into disuse; and estates being rarely conveyed actually, transactions about them rested mostly in covenant and agreement *to* convey. Thus the greatest part of the landed property of the kingdom was in a manner afloat; and nothing but the authority which the court of Chancery had to compel the *execution* of these covenants and agreements could *settle* and fix it. So that many questions of real property naturally became subjects of equitable decision, and added to the regular increase of other matters of common enquiry there, augmented to a high degree the business, character, and consequence of this court.

The great difficulty this court laboured under was, how to enforce its decrees. For as it proceeded only *in personam*, instead of giving execution of the thing demanded, it could only imprison the party who disobeyed its orders, till he performed them. The primitive course of process by *subpœna*, *attachment*, and *proclamation*, was found ineffectual; and the chancellor had lately added another writ, which was to issue upon the failure of the former. This commissioned all persons to take the party, as *a rebel*, and contemner of the law; a process, on that account, called

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a commission of rebellion. Upon this, it was held, they might proceed to breaking open houses to execute its commands. (Crompt. 47 a b.)

This used to issue as well to compel an appearance as to enforce a decree. The chancellor went still farther, and took upon him to call in the process of the House of Lords, the *sergeant at arms;* and afterwards, towards the close of this reign, the *sequestration* was introduced. Neither of which, however, are mentioned in Crompton's Jurisdiction of Courts, published in 1637. The sergeant at arms was sent as an officer of the chancellor, specially directed, to see whether the returns to the former writs were true, and whether the party really hid himself from justice: if this turned out to be the fact, then he issued a commission to certain persons to sequester his lands.

However, these two processes were not set up without some controversy with the courts of common law. It was the opinion of the judges in the latter end of this reign, that if the sequestrators were resisted, and any of them killed, it was only homicide *se defendendo;* a decision that went very far towards declaring this new-invented process illegal. The increase of suits here, and the consequent increase of the chancellor's importance in judicature, supported by these bold innovations, raised a great jealousy in the judges of the court of King's Bench. This did not proceed to great lengths in the present reign, but in that of the successor embroiled the two courts in a long competition for precedence, control, and superiority.

Judicature of the master of the rolls.

As the number of suits increased, the chancellor needed assistance in deciding upon them. We have seen what liberty Cardinal *Wolsey* had taken of delegating judicial authority to several persons. In the time of Edward the Sixth, Lord *Southampton*, then chancellor, having given himself to politics, needed the like assistance in matters of judicature; and accordingly granted a commission to the master of the rolls, and three masters, by which they or any two of them were empowered to hear and determine all manner

of causes in Chancery, in the absence of the chancellor; with a proviso, that all decrees made by them should be *presented* to the chancellor to be signed before they were enrolled. This commission made much noise at the time, as well because the masters were usually at that time civilians, as also on account of the nature of such a delegated authority. The common lawyers petitioned against it; and it being referred to the judges, they were of opinion that it was illegal, because granted by the chancellor alone, without the approbation of the protector and council; they holding, that he could not depute his judicial authority to any other. (Hist. Chanc. 86.) In the same reign there was a commission, during the sickness of Lord Rich, properly warranted. This was to the master of the rolls, two judges, and five masters; of whom, the master of the rolls, the judges, and two of the masters, constituted a *quorum*.

In this reign, during the vacancy of the seal, after the death of Sir Christopher Hatton, a commission to hear causes was made to four judges; and afterwards, by degrees, it was thought proper, as business multiplied, to enlarge it to all the judges and masters, and to make a standing general commission upon that plan; in which, it is said, the masters always made part of the *quorum*. But this occasional duty filled up very little of the time of the masters; they were now entirely abstracted from the business of the seal, and the making of writs; and though now and then consulted in matters of judicature, had much leisure. Therefore the chancellor began some time in this reign to refer to them an examination into matters depending in court, which, at length, became their ordinary employment. From this period also, we may date the regular judicature exercised by the master of the rolls.

Before we leave this subject it will be proper to mention stat. 5 El. c. 18., which was made in order to remove a doubt that had been entertained, whether the same authority, jurisdiction, and power resided in a lord-keeper as

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in a chancellor; Sir Nicholas Bacon being, at that time, lord keeper. It was, therefore, enacted and declared, that he hath and always had.

Terms limited in use being, after the determination of the above cases, known to be out of the power of the *cestui que use*, became a new species of limitation, in cases where it was expedient to restrain the taker of an interest from the destruction and management of his own property. It was, probably, a little after this, that such terms began to be introduced into conveyances with that intention; for the various purposes and trusts we often see in the usual forms of settlements at this day.

Courts began to go farther in favour of executory devises than they had hitherto ventured in case of terms for years. The determination in the reign of Henry the Eighth (36 Hen. 8.) that established gifts of chattels after an estate for life, with this qualification, *if* the taker for life did not actually dispose of it, was reconsidered; and, in some degree, brought back to the old notion; for in 20 El. in *Welcden and Elkington*, (Plowd. 519.) a remainder of a term for years, after a prior limitation for life, was adjudged *absolutely* good. Though even here great reliance was had on the first estate being expressed with some qualification, "to my wife, *for as many years as* she shall live." And the court were there of opinion, that an entire unqualified estate for life would have swallowed up the whole term, and the remainder-man have been without remedy. In 28 El., in *Peacock*'s case, the court were again called upon to give their opinion upon the nature of these devises; and there, where a lessee for years devised his term to one, and the heirs of his body begotten, and the devisee had issue, and aliened the term, it was held by the King's Bench, that a term for years cannot be entailed. (4 Inst. 87.)

Executory devises.

Covenants to stand seised.

Covenants to stand seised had been now established by solemn adjudications. These instruments had been mostly applied to raise uses on occasion of marriage; though

sometimes they were made merely on bargains for money. (And see *infra.*) The next point to settle was *the consideration* upon which they might be grounded, so as the uses might be raised and effectuated according to the appointment of the deed. It had long been agreed that money which formerly raised a use upon a bargain and sale without writing, was of course sufficient to answer the same purpose upon a deed. And it was now agreed in 8 Eliz., after much investigation into the nature of this conveyance, in the case of *Sharrington and Strotton*, (Plowd. 309.) that the consideration of *blood* or *marriage* is sufficient to raise the use; and particularly there it was resolved, that the affection of the covenanter to provide for his heirs male which he should beget, and a desire that the land should continue in the blood and name of his family, and the love which he bore to his brothers were of that kind. But other considerations, such as long acquaintance, &c., though strong motives for liberality, are not sufficient to raise a use upon this family conveyance, which was generally in consequence, or in contemplation, of marriage. Thus was the nature of this conveyance at length settled; that is, such covenants as were *executed* and recognised by the courts of law. But covenants *executory*, that is, such as gave only a future estate, remained as in the last reign, when there was a direct determination against them.

The nature of uses underwent in this reign a more complete examination than they had received before. Their origin and progress, with the operation of the statute upon them, and all its consequences, were canvassed in every point of view; and this system of property settled upon principles that rendered it less vague and obscure, though much more refined, than heretofore.

Of f offees to a use.

Respecting the interest of the feoffees, it was resolved in *Delamere and Barnard*, in 10 El., that the feoffees might enter to revest the use. The case was this: — *Robert* and his wife, tenants in special tail, remainder to *Robert* in

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general tail, remainder to *Simon* in fee. Here *Robert* enfeoffed *A.*, who, before stat. 27 Hen. 8., enfeoffed *B.*, and he enfeoffed *Simon*, who enfeoffed *D.*; upon whom, after the death of *Robert*, the feoffees entered to revest the uses to the wife of *Robert*. Then it was determined, after great deliberation, that the entry of the feoffee was lawful, that he thereby revived the use, and the statute executed it to her in tail; and this, because the feoffment was made by the remainder-man *Simon*. And it was said, that it was never the intent of the makers of stat. 1 Ric. 3. that the particular tenant should lie at the mercy of those in remainder, who might thus disturb their rights; to prevent which, there should by law be a right in the feoffees to revive such uses by entry. (Plowd. 352.)

This point was again considered in 16 Eliz. in Lord *Pawlet*'s case. A feoffment was made to the use of *D.*, the wife of the feoffor, for life; and if the feoffor survived, then to the use of the feoffor himself, and such person as he should happen to marry, for term of their lives, for a jointure, the remainder over in fee. The remainder-man in fee and the feoffees, with the consent and privity of the feoffor himself, joined in a feoffment to new feoffees, to other uses, and levied a fine. The wife died, and the feoffor took another wife, and died. The second wife, with the assent of the first feoffees, entered; and it was made a question whether this entry to revive the uses was congeable. It was argued with much earnestness, and it was the opinion of Lord *Dyer*, that the new feoffment being made with the assent and will of the feoffor and his feoffees, no injury could be said to be done to the second wife, who was not *in esse* as to her title to claim at the time. And whereas some had argued that the feoffment by the feoffees was a mere nullity, they having no estate or interest since the statute: it was answered, that notwithstanding the statute, yet *adhuc remanet quædam scintilla juris et tituli, quasi medium quid inter utrosque, scilicet illa possibilitas futuri usûs emergentis, et sic interesse, et titulus, et non tantum nuda*

auctoritas, seu potestas remanet. But the judges were equally divided, and the cause was adjourned into the Exchequer Chamber, when the parties came to an agreement, and there the matter rested, till the famous case of *Perpetuities*, in the 36 Eliz.

The case of perpetuities.

In *Chudleigh's* case, in 31 El., called the case of *Perpetuities*, this matter was again fully debated, and at length solemnly resolved in the Exchequer Chamber, by ten judges against two, that there resided in the feoffees no right of entry to revest the uses, if they were disturbed by any of the *cestui que uses*. The case was this:— Richard Chudleigh, having issue several sons, enfeoffed certain persons to the use of them and their heirs during the life of his eldest son; and after to the use of the first son of his eldest son in tail; and so on to the tenth son; the remainder to his second, third, and fourth sons in tail; remainder to the right heirs of Richard. Richard dies, and before issue born of the body of the eldest son, he is enfeoffed by the feoffees, and then has two sons: and it was a question whether the use, which before was in contingency, should vest in the said two sons, and be executed according to the statute.

The grounds upon which the two judges went, who were for preserving the contingent use, were principally these:— That the statute was not made to eradicate uses; but, on the contrary, had advanced them, and established a safety and assurance for the *cestui que use* against his feoffees. Before the statute, the feoffees were owners of the land; since, the *cestui que use:* before, the possession governed the use; since, the use ruled the possession. There is nothing, said they, in the preamble of the act that condemns uses; but it speaks of extirpating subtile practised feoffments, fines, and recoveries; which was to be effected, not by destroying uses, but by devesting the estate out of the feoffees, conusees, and recoverors, and vesting it in *cestui que use;* and to say, that *scintilla juris* remains in the feoffees is against the very meaning of the statute. As the statute says seised, or *at any time seised*, the seisin of the feoffees at first would be

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sufficient to serve all the uses, as well future, when they come in possession, as the present: for there needs not a continued seisin, but a *seisin at any time*; therefore, the first seisin, by which the fee is given to the feoffees by the feoffment, would serve all the uses, and nothing afterwards remained in the feoffees. So that the whole estate vests first in those who have the present use *in esse*; and when the future uses come *in esse*, then they shall come in between the other estates which were before conjoined. The disturbance, in this case, is not to the first seisin, but to the seisins that arose to the *cestui que use* by the statute. The first seisin cannot be devested, but still remains, to which the future uses have relation; and so there is both a seisin and a use: and the contingent uses are in abeyance and preservation of law till they come *in esse*.

To this it was answered, and agreed to by one or other of the judges on the other side, that the feoffment made by the feoffees, who had an estate for life by the limitation of the use, devested all the estates and future uses, notwithstanding the eldest son had notice; for the new estate cannot be subject to the ancient use. These estates must be subject to the rules of law; and the law says, that the remainder-man must take the land when the particular estate determines, or else it becomes void. And as by the feoffment of the tenant for life he forfeited his estate, and those in remainder were not *in esse* to take, therefore these remainders by this matter *ex post facto* were destroyed. They agreed to the case of Lord Pawlet. They said, by the statute no use is executed but those *in esse*; there should be a person seised, and a person to take the use: and if the person or the use are not *in esse*, but only as it were in a possibility to have a use, there can be no execution of the possession to the use; as before the statute such a feoffment would have devested all the uses, present and future, till the estate, out of which they were to arise, was recontinued. So, since the statute, no use can be executed unless there be seisin in some person subject to the use.

By the statute, none are to be executed but uses *in esse*, in possession, reversion, or remainder; for it says, such *cestui que use* shall be adjudged in lawful possession; which cannot be said of a person not *in esse*, who hath but a possibility, which may never happen. So that no estate is by the words of the statute devested out of the feoffees, but where it can be executed in the *cestui que use:* and as a person not *in esse* cannot have a use, so neither can he have the possession by the act.

They held, that the feoffees, since the statute, had a possibility, as it were, to serve the future uses when they came *in esse*, if the possession be not disturbed by disseisin, or otherwise; and if they are disturbed, that they have power to enter to revive the future uses according to the trust reposed in them: but if by any act they bar themselves of their entry, that is a case which is not remedied by the statute, and remains as it was at common law. And in this case it was agreed by all of them, that by the alienation of the estate out of which the seisin was to have arisen, and by the destruction of the particular estate out of which the contingent remainder depended, the use was entirely gone.

These were the grounds upon which both sides founded their opinions, and judgment was given against the contingent use. The judges came also to some resolutions upon the nature of uses in general: it was held, that the statute should not be construed by equity to preserve *contingent* uses, which would lead to some of the mischiefs meant to be remedied by that act. It was wrong, they said, to imagine that uses could be limited in a manner different from estates at common law; that in truth there was no difference at this day between estates conveyed in use and conveyed in possession; for the estate and limitation of a use ought to be known, and governed by the rules of the common law, and not construed so as to maintain an uninterrupted perpetuity, which would follow from the opinions of those who endeavoured to support this contingent use. The consideration of perpetuities alone, it was said, would

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have been a good argument of expediency in this question, and would have had no small weight in the decision, could it not have been made on sound principles of law. The consequences of perpetuities were recounted by the judges, and reprobated with much force. (1 Rep. 120—140.) This is the substance of this famous case of perpetuities, in the account of which it was thought proper to be thus minute, as it became a leading one, upon the doctrine of uses and contingencies.

Scholastica's case.

Notwithstanding perpetuities were so inveighed against in this case, a curious point was decided by the judges of the Common Pleas in 13 Eliz., by which it was established as law, that a tenant in tail might be restrained for alienation by the original donations: this was in the famous cause of *Newis et uxor* v. *Lash* and *Hunt*, or what is more familiarly known by the name of *Scholastica*'s case. A person devised land to his eldest son in tail, with remainder to his next son, remainder to *Scholastica*, his daughter, with several remainders over to others of his own name; and then he subjoins a clause to this effect: "That if any of the parties should alien, sell, pledge, mortgage, entangle, encumber, or dismember the lands, he and his heirs should be excluded from the benefit of the will, and the land should immediately descend and come to the person next in tail, the same as if such disorderous person had not been mentioned in the will." After the death of the testator, the two sons joined in a covenant to levy a fine and suffer a recovery, which was accordingly done; and then after the death of the eldest son, *Scholastica* and the plaintiff, her husband, entered by virtue of the clause of forfeiture, and then bringing an assise, the above facts were given in evidence; and being demurred to, and argued in court, the justices were all of opinion in favour of the clause of forfeiture.

The great doubt had been, whether it should be construed as a *condition* or a *limitation*, and how it stood with the law, and who should defeat the entails, and by what means. And they all agreed it was not a condition; for if it should,

then the heir should enter and defeat all the estates: but here it was far from the devisor's intent that all the estates should be defeated; for his intent was, that if any attempt was made to defeat them, the land should go to the next in tail. And to this purpose *Harper* and *Dyer* quoted a case in 29 Ass. 17., where land was given to one for life, and that he should be a chaplain, and sing for his soul; with remainder to the commonalty of the town to find a chaplain perpetual. The devisee entered, but being no chaplain, the heir of the testator ousted him: and it was held by the court that this was no condition, for breach whereof the heir might enter; because it would defeat the remainder, and so disappoint the intention of the testator, who meant to have a chaplain perpetual: so they concluded, that words in a will seemingly tending to a condition shall not be so construed, when it appears the testator did not mean that all the estates should be disappointed. Besides, in this case, the eldest son took an estate, and it was meant he should be restrained; but if this was a condition, he only could enter, and when he made a feoffment, that power would go with the feoffment, so that no one would be left who had power to enter. They therefore held clearly that it was not a condition.

The next enquiry was, whether it was a limitation of estate; and, if so, whether entry was necessary before it could be determined; and then, whether the next in remainder was privy enough to enter. For Lord *Dyer* said, if a gift was made in tail, upon condition, that if the donee does such an act, the estate should cease, that *Frowicke* held in 20 Hen. 7. the estate should not cease before entry; because it is an estate of inheritance, which should not cease by parol without an entry in fact; but otherwise of an estate for life, for that might pass in some cases by parol, as by surrender, and, therefore, might be determined by parol.

And they all agreed it should be held a limitation, that is, a devise to the party *until* he does the acts there forbid;

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so that when he had done any of them, it should end, as if he died without issue. As where land is given in tail, as long as *T. S.* has issue; when that issue ceased, the land is cast upon the donor without entry. If the words, therefore, were not aptly put, yet, as they amount to a limitation, they shall be taken as such, especially in a will where the intent is to be made out, and pursued as well as possible. For as *Dyer* said, a man's will is as an act of parliament, so that the law submits to the matter, order, and form limited therein, and requires it to be observed. As the will directs the estate should, so the law will order it. *Dyer* said, it was like an action *causâ matrimonii prælocuti*, where the estate should be defeated by intent, without an express condition in deed. Again, where land was given to husband and wife during the coverture, or as long as such person is abbot of such a place; these are times of limitation, and the estates would end where the event there mentioned had happened.

In support of their determination, *Dyer* mentioned a conveyance which he had seen made by *Fitzjames*, chief justice of the King's Bench, in 28 Hen. 8., to his wife; whereby she had an estate for life with remainder over, upon condition, that if she should make a discontinuance of other lands, which were assured to her, then her estate should cease, and he in remainder enter. *Dyer* said, it was to be presumed, that he being chief justice made this estate with the assent of his brother justices; and that they understood it to be a limitation, and not a condition. And that if it was so in that instance, which was by deed, he thought, *à fortiori*, it was good, when by will. And so they all agreed that it was a good limitation to determine the estate, and that *Scholastica*'s entry was lawful. (Plowd. 408.)

In 36 Eliz., in *Bateman* v. *Allen*, another action was brought upon the clause of limitation in this will; for the present plaintiffs levied a fine, and *Scholastica*'s next sister made a lease, and an ejectment was brought; but

judgment was there given upon another point, without entering at all on the matter in law. (*Bateman* v. *Allen*, Cro. El. 437.) So ill founded is the assertion of Lord Coke, that an opinion was then delivered by the chief justice and two others, contrary to the resolution in *Scholastica*'s case. (10 Rep. 42.) It is true, that he might discover by the roll the judgment was given against the parties claiming under the limitation; and so it appears by the report in *Croke*, who expressly says, that judgment was given without any regard to the point of law. However, it seems, that the judges had now begun to entertain a different opinion of these provisoes to cease estates; for in 37 El., in the case of *Germyn* v. *Arscot*, it was held by the whole court of Common Pleas, that such proviso was repugnant and void; and this was after open argument in court, and a conference with the other judges. (Moore, 364.) In the following year, the proviso in *Scholastica*'s case was again brought in question, in the court of King's Bench, to try the point, which was avoided in *Bateman* v. *Allen*, and which, since the late change in opinions, it was thought would be adjudged in a different manner from the first decision in *Scholastica*'s case. This was in *Sharrington* v. *Minors*, when it was held by *Fenner*, *Gawdy*, and *Clench*, that the proviso was good and the entry lawful, according to the judgment in *Plowden*. But Chief Justice *Popham*, relying upon the case of *Germyn* v. *Arscot*, said, that notwithstanding the indulgence to be given to wills, this was an impossible limitation; for if the estate was to cease, as if it had never been made, then he would be a trespasser *ab initio*; therefore, the construction should be, only to cease from the time of the alienation; and if so, it could not cease till the alienation was complete, and then the entail would be discontinued; and that discontinuance should be purged by a formedon, stating the special matter, and so the discontinuance might be avoided, but the entry could not be congeable. (Moore, 544.) These were the reasons of the chief justice, which seemed to be applied

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more to the mode of availing oneself of the proviso, than to the proviso itself.

A similar proviso was brought in question in the court of Common Pleas, in *Cholmley* v. *Humble*, much about this time; and it was adjudged to be void for three reasons: the principal of which were, first, because it was repugnant to say the estate should cease, as if the tenant in tail was dead; for his estate could not cease by that event, but only by the event of dying without issue: secondly, the estate could not cease by levying the fine, for then there was no estate in being. (Moore, 592.)

A point on the law of forfeiture was settled in the case of *Hales* v. *Petit*, which was occasioned by the unhappy end of a learned judge, whom we have mentioned several times in this history. Sir *James Hales* had endeavoured to resist the illegal proceedings of Mary with the same firmness as he had opposed in the former reign the unlawful attempt to exclude her from the throne; but this merit could not protect a refractory protestant: he was committed to custody, and treated with great severity, till he was deserted by the constancy of mind he had before discovered, and, in a fit of frenzy, drowned himself. He and his lady were joint purchasers of a lease for years, and the widow was now obliged, in a protestant reign, to contend with a grantee of the crown, if she could establish her right of survivorship before the right of forfeiture. But the court of Common Pleas, after some argument upon the nature of the felonious act, resolved, that the forfeiture of the goods and chattels real and personal should, in this case, have relation to the act done in the life-time of the deceased, namely, his throwing himself in the water; and then, notwithstanding the wife, before any office found, be adjudged in the term by survivor, yet, after the office, the term should be adjudged in the crown: for the office, said they, has relation prior to her title of survivor, for it refers to the act done, which was equivalent to a grant by deed in his life-time to the king. *Weston* went further, and said,

though the forfeiture should have relation only to the death, at which time the title of the wife accrued, yet, in this concurrence of titles, that of the king should be preferred. For so, he said, it would be if a woman took husband, and had issue, and land descended to her, and the husband entered so as to be entitled to the curtesy, and afterwards the wife is found an idiot, the king shall have the land, and not the husband by the curtesy; for the husband was entitled by the first possession of the wife, and the title of the king shall have relation to the first possession of the wife, in which case the king shall be preferred. [Some doubt of this piece of law.] (4 & 5 El. Plowd. 263.)

Between the argument and the decision of the above cause, and the writ of error brought, another question of forfeiture was litigated in the court of Common Pleas. Lord *Lovel* had made a lease for life, with condition, that if he died without issue, then the lessee should have the fee. The lessor was attainted of treason by stat. 1 Hen. 7., by which all his lands were forfeited, with a saving of all rights, titles, actions, and interest of strangers. Afterwards he died without issue; an inquisition of office was found; and it was now a point of law in the case of *Nichols* v. *Nichols*, whether the grantee of the crown was entitled in preference to him who claimed under the condition.

The first consideration seemed to be, whether the fee was out of the lessor immediately and before the condition was performed. And it was agreed by the counsel on both sides, and by all the justices, except Lord *Dyer*, that the fee did not pass till he died without issue, for the condition was precedent; and by the word *then* he showed that it was not to take place till the condition had been performed. Thus, if it is agreed that upon paying 10*l.* then the person paying shall have a lease, it was held in *Wheeler*'s case, (14 Hen. 8.) that the lease should not commence till the payment: the same in *Plessington*'s case, (6 Ric. 2.) and several others. But Lord *Dyer* cited a case which, he

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said, was in *Frowicke's* reading, of a lease for years to an alien, upon condition to have the fee on paying a sum of money; the king makes him a denizen, and then he pays the money, and, upon office found, *Frowicke* held, the king should have the fee. To which case none assented; and the learning of conditions precedent had been so often settled to the contrary of late, that the opinion of the chief justice seems quite unwarranted.

After some debate how the lessee should take his fee-simple, whether as a reversion or grant, they, at length, concluded he should take it as an enlargement of his first estate, which was merged in it. When these points were agreed, the other doubts arose upon the act of attainder; and then it was argued, whether that prevented the estate vesting in the lessee on performing the condition.

It was argued, that the condition could not have any effect if the privity of estate was dissolved by the lessee aliening, for his grantee could not avail himself of it; and they said it was the same if the lessor conveyed away his reversion, which is really done; for the act of attainder, by the word "*forfeit*," has given it to the king in possession. And they endeavoured to show that the condition was not within the words of saving in the act; but, supposing it was, the fee-simple, when vested in the king, could not be divested out of him and given to the lessee, without *monstrans de droit*, or petition, for land cannot be taken out of the king, any more than given to him, but by matter of record. And as it could not vest in the lessee immediately, it was one of those cases where it should never vest, though a petition or *monstrans de droit* were sued. So it would have stood without the office; but that has so confirmed the seisin of the queen, that the lessee's claim to the fee is utterly destroyed. And of this opinion was *Manwood*, justice, who thought the fee vested in the king by the word forfeit, and that the condition was not within either of the words in the saving.

But all the other justices were of a contrary opinion;

and, first of all, they pronounced the office to be ill pleaded and informal, and so, as it had no effect, they considered the case as if none had been found. And all, except *Manwood*, held that the word "*forfeit*" did not vest the reversion in the king; for it only gave a right which he had by law before, and the king's title could not be made appear but by record; so an office must always be found to show the land in certain; and for this reason it was that stat. 33 Hen. 8. c. 20. was made, that, in case of treason, the king should be in actual and real seisin, without office or inquisition; but this happening before that act is not remedied by it. The justices spoke to the other points that had been made, and they held that no privity was necessary on the part of the lessor; but that the condition was an agreement real, with which the land was charged into whatever hands it came; in proof of which they relied on *Plessington*'s case (6 Ric. 2. Fitz. Quid juris, 20.), and so they all held but *Manwood*. And *Harper* argued that the saving in the act was not necessary to preserve the condition to the lessee, for the act was merely a conveyance to the king, and could not be meant to do wrong to an innocent person; for if the pawner of a jewel is attainted, the king cannot claim without paying the money for it. And Lord *Dyer* thought if the saving was necessary, the word *interest* would have saved the condition; but *Harper* thought it was not saved by that or any of the other words. It was held by most of them, that, supposing the word "*forfeit*" conveyed the possession in deed to the king, the lessee must have been driven to his petition of *monstrans de droit*. But some of them were of opinion, that, though by relation of the office (if properly found) the fee would be in the king from the commencement of the parliament when the lessor was attainted, yet it was chargeable with the condition, and, when that was performed, should be immediately devested, without petition or *monstrans de droit*; for if it could not vest presently, they agreed with those who said it could not vest at all; but they thought the

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conclusion should be the contrary to that they had drawn; and they said, it was no uncommon thing for land to be devested out of the king without those formalities, as in case of remitter.

At length the court gave judgment against the grantee of the crown, upon the ground of the condition being good, and having been performed. (Plowd. 481.)

In the case of *Alton Woods* we have both a question of forfeiture and a grant of the king. There the case was shortly this: —a person conveyed by fine to the king in tail, and afterwards the heir of the conusor being attainted of treason, the reversion came to the king, who makes a grant in tail; after this, an act was passed in 28 Hen. 8., ordaining that the land should be adjudged in the king in fee-simple; the said fine, or any other thing, to the contrary notwithstanding, with a saving of the rights of all persons, except that of the conusor and his heirs. This case was argued in the court of the Exchequer, where the counsel for the crown (*Coke* being then attorney-general) made two points: first, that the grant was void; secondly, admitting it to be good, that stat. 28 Hen. 8. had given it the king again. In support of the first point, it was said that the king's intent was to grant an estate-tail, which he could not by law do, having himself only an estate-tail; and because his grant cannot take effect according to his intent expressed in his grant, the grant is void, and shall not be construed to pass any other estate than he intended to grant. On the other side, two objections were made by way of rules to govern the construction of the king's grants: one was, that the grant shall enure as it lawfully may, and so shall be good to the grantee in possession during the king's life, and then a good grant of the reversion in tail, for in such manner the king might grant. The other was, that grants *ex gratiâ speciali, certâ scientiâ et vero motu*, imply that the king took knowledge of his estate, and such grants shall be construed as strongly against him as those of common persons. To this it was answered, that it

would be a violent construction to make this grant inure by such fractions of estates; namely, to the grantee in tail during the king's life, which would be only an estate *pur autre vie*, with a reversion in tail in the king, and then to grant his reversion to the grantee in tail, upon which the king would have a reversion in fee-expectant: all which was wholly contrary to the king's intent. And as to the two rules above laid down, they said there was another, namely, "that where the king was deceived in his grant the grant was void;" and the other two were true, and should be observed, with an exception that they did not contravene this important one. As to the second point, they said the land was expressly given to the king by the act of parliament; and the saving could never be construed to protect the right of the person possessed of the land so given, for that would be repugnant and destructive of the very design of the act.

To this reasoning the court did not assent: but *Periam* the chief baron, and *Ewens*, against *Clerk*, were of opinion, as to the first point, that the grant being *ex certa scientiâ*, &c., was to be taken as strongly as against a common person being tenant in tail, with a reversion expectant, in which case the estate would be derived out of both the estates, and none should avoid it but the issue in tail; and as to the second point, they held, that as before the stat. 28 Hen. 8. the grant was voidable by the issue, it was now unavoidable, for by the act the estate-tail was utterly extinct, and barred for ever.

Upon this judgment a writ of error was brought; and after some arguments at Serjeants' Inn, an opinion was delivered by the two chief justices, and Sir *Thomas Gawdy* in the Exchequer Chamber, contrary to the judgment in the Exchequer, and the reasons they went upon were much the same as those already urged by the attorney-general; and in this they were confirmed by the lord keeper Egerton and the lord treasurer, who both delivered their arguments in court (1 Rep. 40.) to the same effect.

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Action of assumpsit.

The establishment of an action of *assumpsit* upon firm and legal grounds as a substitute for *debt* in cases of simple contract, was an event of great consequence in the course of remedial proceeding. This action had been used many years back, but had always passed *sub silentio* without being debated at all in court. But of late the validity of it had been agitated, with some difference of opinion: the court of Common Pleas had held that this action was not maintainable; the court of King's Bench that it was. It was argued by those who held the former opinion, that the wager of law which was only allowed in debt would be taken away by introducing this action of *assumpsit*, and the confidence between men to which the old notion of law-wager paid great regard be for ever destroyed; while those of the contrary opinion thought that plea was objectionable in its very nature, and that it was full time to put defendants to some other proof of their payments than a discharge vouched only by a man's single oath, and so bring the trial of a demand from the oath of the party and his compurgators to the verdict of a jury.

At length, in 44 El. in *Slade*'s case, the point was argued before all the judges, and it was resolved by them that the action was maintainable (4 Rep. 93.); and to settle the question upon principle they came to several resolutions: First, they resolved, that although an action of debt lies upon the contract, yet the bargainer may have an action upon the case, or of debt, at his election; which was authorised by precedents so far back as the reign of Henry the Eighth, Henry the Seventh, and Henry the Sixth, where the declarations were, that the defendants in consideration of a sale to them of certain goods *promised* to pay so much money. They resolved again, that every contract executory imports in itself an *assumpsit*; for when any one *agrees* to pay money, or to deliver any thing, thereby he *assumes* or *promises* to pay or deliver it. Therefore, when one sells goods to another, and agrees to deliver them at a day to come, and the other in consideration thereof agrees to pay

so much money at such a day, in that case both parties may have an action of debt, or an action upon the case, on *assumpsit;* for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case as well as of debt.

They also resolved that the plaintiff in this action shall not only recover damages for the special loss, if any, but also for the whole debt; so that a recovery in this action would be a good bar in an action of debt upon the same contract, and so *vice versâ*, as had been long before determined. (12 Ed. 4. c. 13. 2 Ric. 3. c. 14.) And they resolved, that an action upon the case is as well a formed action, and contained in the register as an action of debt.

The solemn determination of this question confirmed the practice of bringing *assumpsit* in all matters of contract. The action of debt being consigned only to instances where the wager of law did not lie, as when it was grounded on a specialty on an act of parliament which took it away, for rent, and the like. In order to accommodate it to all the various instances in which it was applied, new forms of declarations were devised: that in the present case alleged, that in consideration that the plaintiff, at the special instance and request of the defendant, had sold to the defendant such and such grain (naming it), the defendant *assumed*, and faithfully promised that he would well and truly pay so much money. This was drawn with a retrospect to an actual promise. Soon afterwards was formed the *indebitatus assumpsit*, where the declaration suggests that the defendant was indebted to the plaintiff in so much money, and being so *indebted, he assumed* (or promised) to pay. Upon the trial of which action, if a debt was proved to be due, the law, according to the above resolution, would *raise a promise*, and thereby satisfy the whole of the declaration. The same of other forms, all founded upon this postulate; as *quantum meruit, insimul computasset*, and the like, all which were inventions of a later date; being, indeed, framed

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from precedents then in use for actions of debt, which were adopted in this action by suggesting a *promise*.

However, these being all cases of buying and selling, the supposition of a promise was generally nothing more than was really the fact at the time of the bargain; or, at least, the considering the agreement as a promise to pay was easy and consistent. But when the idea of a *promise* was suggested merely to comply with the form of the action, and was not absolutely necessary to be proved on the trial, provided a debt was made out, it was seen that other duties and demands might be claimed in an action of this kind, where it was evident that no actual promise had ever been made; but the law was trusted to for implying one, where there was proved to be a duty incumbent on the defendant to have made one. These actions, *upon promises* merely *implied*, were of a very liberal conception, and were calculated so as to apply themselves almost to all purposes of redress. The nature of these led into much debate upon *considerations* to raise such implied promises; that is, whether the defendant had received a reasonable purchase, or motive to make the promise suggested, and to entitle the plaintiff to call upon the law to substantiate and give effect to it.

Actions by bill in K. B.

We have before seen what was the course of the King's Bench in the reign of Henry the Seventh, in entertaining suits against defendants by bill; though they had then so far got over the scruples of their predecessors as to be contented with *evidence only* of a person's being in custody as sufficient to give jurisdiction to the court; yet they expected, as indispensably requisite, that it should appear he was once in custody by the record of bail. To procure this requisite it was that they contrived about that time the process of bill of Middlesex and *latitat;* which, bringing the party into court on a suggestion of trespass, after bail was taken, and so an evidence of their custody was on record, they could proceed regularly, as against a person in cus-

tody of the marshal, according to the ancient practice of the court.

These were the notions, while they adhered to that primitive requisite of custody which introduced this process; but the opinion on this subject was now totally changed. A more advanced state of learning had enlightened the present age, and taught them that fictions of law, as they are contrived for the purpose of attaining the ends of justice, are to be encouraged by every fair and reasonable intendment. It was in this spirit that they now argued on the proceeding by bill. As the court had taken upon it to fashion this proceeding originally to accommodate it to the ends of justice, they thought they might carry this discretionary control still further. From the primary requisite of actual custody, they had already so far deviated as to be contented with the *evidence* only of custody; and there was every reason for dispensing with this formal evidence, and supposing a defendant in custody of course. This had now become the practice of the court; and bills were filed against persons as in custody of the marshal, who never were, nor were ever intended to be there. Every man in the kingdom was considered in the custody of the marshal, for the particular purpose of answering to a bill filed against him in the King's Bench; and there no longer remained any difference between a proceeding by original and by bill, excepting this fiction.

When the proceeding by bill was regarded in this light, the legal considerations respecting it were a little changed. As the precept of bill of Middlesex and *latitat* were no longer necessary, in order to effect an *actual* custody, and so to found the jurisdiction of the court, the original bill, resuming its primary design, was considered itself as the ground of the court's jurisdiction. For, as in the first state of this proceeding, it was the commencement of an action against a real prisoner, so now, when every one was *supposed* a prisoner, it became the warrant to the court in the nature of an original writ; and the bill of Middlesex and *latitat*

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issued upon it as process to bring the party in to answer to the bill filed.

Thus the bill, as formerly, still gave jurisdiction to the court, upon which was grounded the process to bring the defendant in; in the same manner as the original warrants the process issued thereupon.

The settling the proceeding by bill, upon this broad foundation, put the King's Bench in possession of a more extended jurisdiction in civil matters. This court hereafter advanced, by very quick steps, to a participation of business with the bench, and became more considered every day as a tribunal for common pleas.

Notwithstanding that actions by bill were modelled in this liberal way, when against persons out of custody, yet the old method was preserved when a defendant was in custody: for all persons in the marshal's custody were brought into court to have the bill or declaration delivered to them; and such as were in the custody of sheriffs, or other officers, were first to be transferred to the custody of the marshal, before they could be declared against.

Actions by original.

The ancient method of proceeding by original writ underwent some mutation, from the change of circumstances and times. The practice of the sheriff to take pledges of prosecuting, before he executed the original had long ceased; and it had become the usage to put in the place of real ones only nominal pledges. After this it was no longer of any use to serve the original, or summons, upon it; and therefore a practice begun of suing it out, and getting it returned of course, without doing any thing upon it: and as the courts had long ceased to keep that tight hand upon the process of *capias*, as they did in the reign of Edward the Third, and plaintiffs had been in the habit of taking it out of course in the office when the old process was spent, without applying to the court for leave so to do: as this had long been the usage, it happened, when they begun to return the original of course, and the old process upon it of summons, and at-

tachment dropt, that the first writ the defendant heard of was the *capias*.

These changes were effected after the reign of Edward the Third; but it is not easy to fix the period when they happened, or trace the steps by which they were brought about. These are points of practice which are scarcely ever touched upon by the books, as they rarely came under the consideration of the court.

However, the original was for the most part still preserved, with all its legal forms: it was first issued, was the ground of the action, and, as such, stated the matter of the action specially, being also regularly rehearsed as a part of the declaration. Consistently with this, the process of *capias* was also special; and a copy of the original, and the whole of the proceeding, was in the ancient mode.

Notwithstanding this was the general practice, there is an order made by the court of Common Pleas in 15 El. which intimates that attornies had ventured to deviate still further from the old practice, and used to take out process of *capias* without any original to warrant it: for it is there ordered, that no clerk shall make any process unless the original writs thereof be first taken out in the remembrance of the filazer of the county where the action is commenced. And that attornies might not evade this regulation by making out the process themselves, it is by the same order further provided, that the filazer and his clerk only shall make the process thereof, upon pain of the attorney or clerk paying such fine as the court shall impose. (Prax. Ut. Banc. 37.) This was a symptom of the practice which took place in the following reigns. It remained for those times to establish these novelties; to model, transform, and transpose the writ and process, in a manner which has totally disguised the regular order of proceeding, and introduced no small degree of perplexity and confusion. Notwithstanding the order of court above mentioned, this new practice received great encouragement from the stat. 18 El. of jeofail, which makes the want of an original no longer an error on the record.

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The precipitating the process of *capias* in this manner was productive of some evils: for as the law now stood, it does not appear but that a defendant was liable to be arrested and held in custody, till he put in bail, in every action where a *capias* lay; though the debt or damages were but 40*s.*, and just sufficient to give jurisdiction to the court. The Common Pleas took this into consideration; and in 24 El. made an order, that in all actions personal, a defendant upon a *capias*, returned against him *cepi corpus*, or *reddidit se*, making appearance in proper person, shall put in *good bail*; and that in all actions personal, where the debt or damages do not amount to 20*l.*, the party shall be admitted to common bail. (Prax. Ut. Banc. 62.) This gave relief, at least, in actions sued in the Common Pleas.

Whether the King's Bench made any formal order of the like kind, in actions brought there by original, or a practice analogous to this obtained there, after this alteration in the Common Pleas, does not appear in this reign. But it rather seems, by some cases, in after times, that this point of special bail was left to usage, without any formal order about it. However, there could not be the same doubt, as to bills of Middlesex and *latitats*; which, being for trespass, and containing no specific demand of debt or damage, as they were not to be governed by any regulation of that kind, still continued in their full force; and defendants were thereupon obliged to give special, or as it was then called, *good* bail, without knowing the cause of action.

That defendants might not be harassed by attending at a distance from home, it was ordered by the court of Common Pleas, in 15 El., that no attorney shall sue an action, other than debt, but in the proper county, where the cause of action arose, without leave of the court; under penalty of 40*s.* for the first offence, and expulsion for the second. (Prax. Ut. Banc. 58.) A method was taken to oblige sheriffs to execute process with regularity. Not content with the proceeding by attachment, the court of Common Pleas in 15 El. made an order, that sheriffs and

their deputies shall return all writs and common process that shall be delivered to them, or of record, and deliver them, or send them returned into that court within eight days after they are returnable, under the penalty of 40*s*. (Prax. Ut. Banc. 54.)

Many orders were made at different times by the court of Common Pleas to regulate the issue and conduct of process and proceedings; by which the several departments of the filazers and prothonotaries were distinctly marked; their duties enumerated; and such a course of things ordained, under divers penalties for the breach of it, as contributed to prevent any unfair application of writs, or other abuse in practice. (Prax. Ut. Banc. 34—72.)

Ejectment.

The action of *ejectione firmæ*, which had been getting into practice ever since the reign of Henry the Seventh, did, during the long reign of Queen Elizabeth, establish itself as the regular and only remedy for obtaining possession of freeholds and inheritances, and for trying of titles. The reports of this time are full of ejectments. It is remarkable that this action, which produced so remarkable a change in the method of trying titles as to render all the old remedies obsolete, had been applied to that purpose, and had derived its whole authority, originally, from no other judicial sanction than the *dictum* we before related in the time of Edward the Fourth, which was succeeded by the adjudication in the time of Henry the Seventh. So common had they now become, that excepting *assises*, *precipe quod reddat*, and *formedons* now and then, real actions are hardly to be met with.

As ejectments were brought to their height in this reign, so were actions upon the case, which were now the most usual remedies in most matters, whether of *tort* or *contract*. However, *debt* used sometimes to be brought, and there are records (Cok. Entr.) which contain the wager of law.

The learning of estates.

The learning of estates which had revived under Henry the Eighth, attended with the circumstance of *uses*, continued to take up much of the attention of courts. Other

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statutes of that reign, besides that of uses, had given occasion to debate on points of this sort, particularly the statute of wills, which, by enlarging the powers of alienation, set much landed property at large, to become the subject of future litigation. To this may be added the dissolution of the religious houses, which had a prodigious effect in multiplying the causes of judicial determination. So frequently do matters of real property recur; so thoroughly were they argued, and so solemnly determined upon, that it would be difficult to say what points had not been more or less sifted. Recoveries, fines, estates, with their properties and incidents, were discussed in all shapes, and under all circumstances.

There had not yet been a period of our law when questions were so learnedly considered. Whatever we have before said of the time of Henry the Eighth may be repeated of this in higher terms. Besides general argument, upon principle, and solid reasoning, they called in to their aid the decisions of cases in former times: these were now quoted more profusely than ever; since they had lately come into the hands of every body by printing the year-books. Cases were almost a new kind of learning in the law, and they were applied and reasoned upon with great dexterity. This led to greater length of argument, as well as furnished more authentic materials, upon which to found it; nobody spoke but from authority; and it was expected that every thing should have its precedent: both sides had theirs, and the negative as well as the affirmative of almost every question was rested on authorities. This made it necessary to weigh with much judgment the cases quoted; to make sure of the facts upon which they arose, and the ground of law upon which they were determined. They were compared and examined: differences were in this manner often discovered between the former determination and that under debate, to which it had been endeavoured to apply it. Upon these, distinctions were struck out; cases seemingly opposite were often reconciled

by these distinctions; and the true principles of decisions were often extracted from determinations apparently contradictory.

This was the style of great law arguments at this time, and that in which they have run ever since. Our law is the work of ages; and being formed by the adjudications of courts as well as by statutes, it follows, from its very structure, that no position ought to carry with it the weight of authority, unless it refer to some rule or principle well founded, or else to some particular instance sanctioned by a judicial decision. This must always have been the opinion of lawyers, long before adjudged cases got commonly into the hands of the world; but now, when a series of decisions for many years back, and those taken down by persons properly appointed, had been printed (the year-books), it became only more usual and more fashionable to call in the aid of some case to support every proposition of law.

The judges entered so fully into matters argued before them, that the opinion of the court often contained a history of the point of law in question, with all its incidents; and, not content with determining the single point before them in issue, they would set about resolving solemnly a string of propositions, some of them intimately connected with, but some of them collateral to, it: such, however, which would naturally follow from the main question, either as conclusions or corollaries. (1, 2, 3, 4, 5 Rep. *passim.*)

Notwithstanding the number of questions upon real property which were argued in the courts of common law, many were prevented from appearing there by the course of conveyancing now in use. Many estates were thrown into *trust*, and under that denomination became subjects of enquiry in the court of Chancery. There a new sort of learning arose upon these matters of confidence: the practice of the law was thereby enlarged, the scope of study extended, the objects of litigation multiplied, and a new turn given to the old law, upon which these accessions

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were engrafted. If estates took a new appearance when clothed with *uses*, they were quite disfigured by the fashion superinduced on them by *trusts*. To preserve the ancient established rules of law inviolate, and give efficacy to these new doctrines, was a difficulty which lawyers were now constrained to reconcile; and this constituted a new modification, if not an entire new species, of equitable law.

As the increase of commerce brought personal property into higher consideration, the learning concerning it increased in magnitude. The reports of this reign contain more questions upon personal rights and contracts, in one shape or other, than, perhaps, those of all the preceding reigns put together. The law of private rights in general became more settled and better understood.

Conveyances.

The conveyances to uses were those in common practice, with very little alteration, except that they were more encumbered with substitutions of estates, and with provisoes, covenants, and conditions; all couched in a minuteness and prolixity of language which had been gradually increasing ever since the beginning of Henry the Eighth's reign, both in deeds and in acts of parliament. These conveyances were mostly *covenants to stand seised*, and other *covenants*. The conveyance by *lease* and *release*, invented, as we have seen, in the reign of Henry the Eighth, does not seem as yet to have been very common, for there is no precedent of one in any of the books of precedents of this period. (Boke of Bec. and West's Symbol.) *Feoffments* were rarely made use of but when possession was to be gained, or where the estate was small and the objects of conveyance few, and the parties could not easily bear the expense of the other voluminous instruments.

Law of uses.

The nature and properties of uses underwent, in this reign, a more complete investigation than they had received before. Their origin and progress, with the operation of the statute upon them, were canvassed in every point of view; and this whole branch of learning was settled upon such principles as have governed it ever since. The law

of uses and trust, when thus reduced into a system, became more refined and subtil, though less vague and indeterminate, than it had been in former periods.

Among other points which had been agitated in the last reign, that concerning the interest and power of the feoffees was again brought forward, and was debated with various success. In the 10th of the queen, this question arose in a peculiar way, in the case of *Delamere* and *Barnard*. The case was, that *Robert* and his wife being tenant in special tail, with remainder to *Robert* in general tail, remainder to *Simon* in fee. Here *Robert* enfeoffed *D.*, who, before the stat. 27 Hen. 8., enfeoffed *B.*, who enfeoffed *Simon*, the remainder-man in fee, and he enfeoffed the defendant *Barnard*, on whom (after the death of *Robert*, the first feoffor, and of the feoffees), the heir of the surviving feoffee entered for reviving the use to the plaintiff, who was the wife of *Robert*. The doubt, in this case, arose entirely upon the feoffment of *Simon*, the remainder-man; for it was agreed on all sides, that the feoffments by *Robert* to *D.*, and by *D.* to *B.*, were all defeasible after the death of *Robert* by the feoffees, who might enter to the use of the wife of *Robert*. But it was said, that when *Simon* made a feoffment, he gave quite another thing than he received by the feoffment made to him, for he gave his use of the fee-simple, which he had upon a good and indefeasible estate. And, therefore, it was argued for the defendant *Barnard*, that *Simon* had given a good and indefeasible estate under the stat. 1 Ric. 3., which confirms all estates made by *cestui que use* against the feoffor and his heirs, and all others claiming only to the use of the said feoffor at the time of the gift made, and as the feoffees claimed to the use of *Simon*, as well as to the use of the estate-tail; and, therefore, said they, the feoffees are barred from claiming their fee-simple, because it was legally given to *Barnard*. Not, therefore, being able to have their ancient fee-simple, they must have a new one, or none at all; and as to that, they said, he had no legal claim to any but the old; and if he had another there

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could not be two fee-simples of the same land, which would not be allowed by law, and he could not have less than a fee. And, in this manner, they concluded that the feoffees had no right of entry under the particular circumstances of this case.

To this it was answered, that the *cestui que use* within the stat. 1 Ric. 3. is *cestui que use* in possession, and not in reversion or remainder; and the feoffees, as they claimed not only to his use, but to the use of *cestui que use* in tail are not barred; and as the present feoffment was not within the letter, so neither was it within the intent of the act, which would never give such power to him in reversion or remainder who had no right to the profits; and they said, such a power would lead to all sorts of confusion. They said, when *Robert* made the feoffment, he had full power to do it by the stat. 1 Ric. 3.; and the fee-simple passed most completely till regress made by the feoffees, which they might do after his death, if there was no obstacle but his feoffment; for that being good only against those claiming to the use of the feoffor and his heirs, and the feoffees, after his death, claiming not to the use of his heirs, but to the use of the wife, the present plaintiff, they were not restrained from entering by the statute. But, in the mean time, the fee being taken out of the feoffees by the feoffment, the use in fee was taken out of *Simon*, and discontinued until the feoffees had made their regress.

This being the great difference between a feoffment made by the feoffees and by *cestui que use*, in the first instance, if the near feoffees have notice of the first uses (whether the feoffment was upon consideration or not), or if they had not notice, and the feoffment was without consideration, in such cases the new feoffees would be seised to the first uses. But, in the second instance, if the *cestui que use* may lawfully make a feoffment (which is the present case), all the ancient uses are discontinued, though the feoffee had notice, and there was no consideration. For all the first estate, out of which the uses were to arise, was thereby taken out of

the feoffees, and a new estate made by the authority of the statute; which estate was always to be to the uses newly expressed, and to no other. Thus, then, the use to *Simon* was discontinued; so that, having only a right to a use in remainder, and not an actual use in fact, he could alien none. In respect of that use, therefore, he could do nothing effectual, nor could any thing he did be executed by the statute of uses, 27 Hen. 8., that statute conveying no possession to a right of use, but only to a use *in esse*. The feoffment of *Simon*, they said, was not within stat. 1 Rich. 3., not only because his was a use in remainder, but because it was only a right to a use: if, therefore, it was not warranted by that statute, it was a feoffment at common law, and no such feoffment at common law could take away the entry of the feoffees. (10 El. Plowd. 351.)

This point was argued, at least, ten times; and, at length, all the justices agreed that the entry of the heir of the feoffee was lawful, and the use being revived in the wife, it was immediately executed in her by the stat. 27 Hen. 8. They all saw how dangerous it would be to allow *cestui que use* in remainder, by release or other act, to hinder the feoffees from entering to revive the particular uses, and that no such mischief could be intended by the stat. of Ric. 3. Another point was started, and took up some debate; this was, as the uses were revived only to the wife in tail, remainder in tail to the heirs of the body of the husband, in what person the use in fee-simple should be revived: some argued it was extinguished, and so resulted to the feoffee; others said, it was revived to Simon, others maintained, that it should be in Barnard; and reasons were given for the disposal of it in each of these three ways. But this making no part of the cause before the court, the Chief Justice *Catline* waved giving any opinion on a matter that appeared to carry some difficulty in it. (Ibid. 352.)

In the case of Dame *Baskerville*, this point of the entry of the feoffees was again agitated. A person *cestui que use* in tail, remainder over in tail, remainder to himself in

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fee, made a feoffment in fee to his own use for life, and then to his eldest son and his wife for life, remainder to them in special tail, remainder to the right heirs of the feoffor; after this came the stat. 27 Hen. 8.; the father then died, the son and his wife entered, and are seised of the estate tail executed by the statute. In this state of things it was made a question, whether the feoffees might enter, and devest the possession out of him and his wife, and revive the use according to the ancient entail. And it was the opinion of *Dyer* and *Manwood*, that the entry of the feoffees was unlawful, for two reasons: one, because the fee-simple of the use was legally passed away, and the right of the feoffees bound by stat. 1 Ric. 3., so that they could not, by their entry, recover their ancient fee-simple; secondly, because the son and heir could not have any other estate, contrary to his own act, and contrary to stat. 27 Hen. 8., so that he could not be remitted to his ancient use: this opinion was reported in Chancery, and *Catline* and *Saunders* joined in it. (15 & 16 El. Dyer, 329. 17.)

The above opinion seems not to correspond with what was agreed on all sides in *Delamere* and *Barnard*, about the feoffment by a particular tenant. In the following, which is commonly known by the name of Lord *Paulett*'s case, this matter was spoken to more explicitly than in the last, or any former occasion. A feoffment was made to the use of the wife of the feoffor for her life, if the feoffor survived her; then to the use of the feoffor, and of such person as he should happen to marry for their lives, for a jointure, with remainder over in fee; after this the remainder-man in fee, together with the feoffees, and with the privity and consent of the feoffor, joined in a feoffment to new feoffees, to other uses, and the feoffor levied a fine to the other uses. Then the wife died, and he took another, and died; after which the second wife, by command and assent of the first feoffees, and after five years since the fine, entered to revive the use, declared in the first feoffment to the second wife. It was much debated, whether

this entry was lawful. Monson and Harper thought that the entry was lawful; and they even thought that the second wife need not have the consent of the first feoffees; because they were barred of all right and interest in the land by stat. 27 Hen. 8., which vested all the estate and title of the feoffees in those who had the use, in the same manner, quality, form, and condition as they had the use. They thought the possibility of a future use to the second was reserved and preserved in the custody of the law; and if any thing was left in the feoffees, it was only a power and authority to make an entry, which was no interest in right in the land; from all which they concluded, that nothing passed by their feoffment to the new feoffees. *Monson* and *Harper* so far differed, that the former thought, that if the feoffees had a title to enter to revive the use, then the feoffment would be an impediment to the entry, and that such feoffment was a disseisin to the particular tenant. The latter did not agree to that. But Manwood and Dyer assented to the opinion of Monson, relying upon a case in the time of the late queen, where the remainder-man in fee enfeoffed a stranger in the absence of the tenant for life; and though the tenant for life occupied during his life, this was held a sufficient feoffment of the fee; and to this the Chief Justice Wray and Chief Baron Saunders agreed.

It was the opinion of *Manwood* and *Dyer*, that though the future use was in abeyance, and *in nubibus*, and in no certain or known person, yet when the contingency happened, and the use also, it was necessary for the feoffees to enter in order to raise this *dead use*, for they were the persons put in trust by the feoffor who created the use; and the feoffment and estate that the feoffees accepted was the root and foundation of the said uses, which sprung from it as the branches or fruit from the trunk of a tree. They said, if the feoffment to the first uses had been before the stat. 27 Hen. 8., then the feoffees after the statute need not have entered to awaken the dormant use, as in case of feoff-

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ment of *cestui que use;* but the second wife might have entered of her own authority: but in the present there is a difference; for here, they said, there was a disturbance and alteration of the uses, and this was with the assent of the feoffor and founder of the uses, and of the feoffees in trust. They said, that at common law the feoffees had sufficient power to change and destroy the use and trust by alienation and limitation, against which there was no remedy but to obtain by subpœna in equity a recompence, and inflict a punishment for the breach of trust.

When the new feoffment was made to new uses, by assent both of the feoffor and feoffee, they said no injury was done to the second wife, who was not *in esse*, nor a person known or ascertained. They said, though by the words of the statute the freehold and fee-simple which was in the feoffees were taken out of them, and vested in *cestui que use;* yet, said they, *adhuc remanet quædam scintilla juris et tituli, quasi medium quid inter utrosque status, scilicet illa possibilitas futuri usûs emergentis, et sic interesse et titulus, et non tantum nuda auctoritas seu potestas remanet.*

The other part of this case turned upon the estate given in jointure to the second wife; and *Dyer* thought that she could not take any estate at all, for she was not capable, nor *in esse* at the time when the remainder fell to the baron; and if she could not take then, no more should she afterwards; the same as if it was the remainder of an estate in possession. However, all the other justices thought an estate in use differed in this particular from an estate in possession. (16 El. Dyer, 339. 48.)

This last point of the contingent estate, as well as that of the entry of the feoffees, was thoroughly discussed; and, after full examination, was solemnly decided by all the judges, about fifteen years after, in the case of *Dillon* and *Freine*, or *Chudleigh*'s case, as it is sometimes called. The last point in Lord Paulett's case upon the keeping alive and *perpetuating*, as it were, the contingent estates, was one of the most interesting topics that arose upon the condition of feoffees to a use. In many of the cases that have already

been mentioned, there was some reference to this idea; but in the cause which we are now going to consider, this became the principal question, and, on that account, it has been called the *Case of Perpetuities.* As the nature of uses was fully investigated in the arguments on this occasion, and the principles then ascertained have been adhered to ever since, it is necessary that this case should be considered with great attention. The facts upon which it arose were these: Sir Richard Chudleigh had issue several sons, and enfeoffed certain persons to the use of themselves and their heirs during the life of his eldest son Christopher, and after his death to the use of the eldest son of Christopher in tail, and so on to the tenth son, with remainder to his second, third, and fourth sons in tail; remainder to his own right heir. Sir Richard died, and before issue born, Christopher was enfeoffed by the feoffees, and after that had two sons. It now became a question whether the use which before was in contingency should vest in the sons of Christopher, and be executed by the stat. 27 Hen. 8.; or, in other words, whether such contingent uses, before their existence, were destroyed and subverted by the feoffment of the feoffees, so as never to rise out of the estate of the feoffees after the birth of the issue. This question was argued many times in the court of King's Bench; and because it was a point of great importance, it was thought proper to refer it to all the judges in the Exchequer Chamber, where it was again argued in two different terms: at one of which the famous *Coke,* then solicitor-general, and at another the more famous *Francis Bacon,* spoke against the contingent use. With these all the judges, except two, agreed and determined, that there resided in the feoffees no right of entry to revest the uses. The substance of the reasons given by the judges was as follows: —

Walmesley Justice, Sir *William Periam* Chief Baron, were the two dissenting judges. They said, that before the stat. Ric. 3. the feoffees had not only the whole estate, but the whole power to give and dispose of the land. After that

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act, *cestui que use* had power to dispose of the land itself; notwithstanding which the estate remained, as before, in the feoffees, till *cestui que use* had made a disposition; so that the *cestui que use* was not sufficiently protected by this regulation, for they might prevent his availing himself of the act by making covinous conveyances; and often the one disposing under the statute, and the other at common law, they confederated together to deceive purchasers. They said that stat. 27 Hen. 8. was not made to eradicate uses, but, they said, it had advanced them, and established safety and security for *cestui que use* against his feoffees. Before the statute the feoffees were owners of the land, and since that, the *cestui que use*; before, the possession governed and ruled the use; since, the use governs and rules the possession; for by the act the possession is made a subject to, and follower of, the use. They said that nothing in the preamble of the act condemned uses; but the act is expressed to be designed for extirpating and extinguishing all such *subtle practised* feoffments, fines, recoveries, abuses, &c.; and these were not to be extirpated by destroying uses, but by devesting the whole estate out of the feoffees, and vesting it in *cestui que use*. So that it would, they said, be against both the meaning and letter of the law, to say that any estate, or right, or *scintilla juris*, remained in the feoffees after the statute; particularly, when it appears from the preamble that the statute was for eradicating all estate out of the feoffees, and the letter of the body of the act is, that the estate which was in the feoffees should be in *cestui que use*, which was a judgment of the whole parliament, that the estate was out of the feoffees. They said that the *scintilla juris* mentioned in 17 El. was like Sir Thomas More's Eutopia, and that no trust or confidence was reposed in the feoffees. *Non possunt agere, aut perficere aliquid* in prejudice of the feoffees. Thus far as to the meaning of the statute, and they said, that, according to the *letter*, *where any person or persons stand or be seised, or* AT ANY TIME *hereafter shall happen to be seised*, &c. They relied much upon the words *at any time*, and

they inferred from them that the seisin, which the feoffees had at the beginning by the feoffment, would be sufficient within this act to serve all the uses, as well future, when they came *in esse*, as present, for there needed not many seisins, nor a continued seisin, but a seisin at any time; and it would be hard when the statute required a seisin at one time only, to require many seisins, and at several times.

Again, if the statute was to be construed as destroying these future uses, they said the established form of pleading, ever since the statute, should be altered, for now the pleading a feoffment in fee to future uses was, *virtute cujus vigore actûs part. &c.; cestui que use* was seised, &c.; from which it appears, that, heretofore, *one* seisin was held sufficient. They said, as a fountain gives to every one who comes in his turn his just measure of water, so the first seisin and estate in fee was sufficient to yield to all to whom any use present or future was limited a competent measure of estate. That in the case at bar the disturbance was not to the first seisin given by the feoffment, out of which all the uses flowed, as out of a fountain, but the disturbance was to the other seisins, namely, those executed by the statute. The first seisin, they said, could by no means be tolled or devested; for it had no essence till the future use had essence, which, by force of the statute, should draw a sufficient estate to it; but when the future use was come *in esse*, then, by reference and relation to the first seisin, there was a seisin and a use within the statute. The chief baron conceived that such future uses, before their birth, were not preserved in the bowels and belly of the land, but that they were *in nubibus*, and in the preservation of the law; for he agreed entirely with *Walmesley*, that by force of the act the whole estate was out of the feoffees, and then it must either be in some person, or in abeyance and consideration of the law; and as it would be absurd to say that the feoffees should have a less estate than they took by the first livery, and the future use could not be executed till the person who should take it came *in esse*, and nothing

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remained in the feoffees, it must, of necessity, in the mean time, be in the preservation of the law, the same as a remainder limited to the eldest son of *A.* was in preservation of the law till the son was born.

They pointed out this difference between feoffees before the statute and feoffees since; for if feoffees were disseised before the statute, no use could be executed after the statute without a re-entry of the feoffees, because they were not seised at the time of the act, nor would, without such entry, be seised at any time after, as the act required. Again, they remarked that the statute did not save to the use of any person *in esse*, but to the use of *another*, which should be intended when his time was come. They desired it might be considered how hard it would be to construe all the future uses in this case to be destroyed, when they had been limited on good and sufficient cause; and the sons, then *in esse*, were not parties to any wrong or covin. [The learned Justice Walmsley concluded by liking uses to Nebuchadnezzar's tree, in which the fowls of the air build their nests, and the nobles of this realm erect and establish their houses; and under this tree lie *infinita pecora campi*, and great part of the copyholders and farmers of the land for shelter and safety; and he said, if this tree should be felled, it would make a great print and impression in the land.] He thought the mischief of an opinion that would destroy these uses would be so great as to need an act of parliament to secure them. These were the reasons which were delivered by the two judges in favour of the contingent uses, and which they supported by the authority of cases, some of which have been before mentioned in the course of this history. (1 Rep. 132—134.)

On the other side it was agreed, by all the other judges, that the feoffment made by the feoffees who had an estate for life by the limitation of the use devested all the estates and the future uses also. They did not think it material that Christopher had notice of the first use, because all the ancient estates were devested by the feoffment, and the

new estate could not be subject to the ancient use, as they could arise only out of the ancient estate that was now devested. *Gaudy* Justice conceived that the uses limited to the eldest son of Christopher were in abeyance, and that the estates of the land sufficient to serve these future uses were in abeyance also. But he agreed it was not by the letter of the stat. 27 Hen. 8., though he thought it should be by the equity of it; for the letter of the act required it to be to the use of *some person*, and here was none: yet he said the uses in abeyance, by the equity of the statute, did draw sufficient estate to serve them in abeyance also, for the saving of future uses from destruction. He agreed that all the uses, as well present as future, were executed immediately; and that the statute was not designed for destroying uses in any other manner than by executing and transferring the possession of the land to them. He thought the whole estate was out of the feoffees; for no right of the feoffees, which they had to another's use, was saved by the statute.

He said, if a feoffment was made in fee to the use of one for life, and after to the use of the right heirs of *T. S.*, the fee-simple should be in abeyance; yet, before the statute, if a man had a feoffment to the use of one for years, and after to the use of the right heirs of *T. S.*, the limitation had been good, for the feoffees remain tenants of the freehold: but such limitation since the statute would be void; because, as nothing remains in the feoffees, the freehold would be in suspense. For the same reason, they thought the remainders in future were devested and destroyed by the feoffment of the tenants for life; and although they were in custody of the law, yet they ought to be subject to the rules of law, for the law will preserve nothing against its own rules. It was an established rule, that the remainder must take the land when the particular estate determines, or else it shall be void; and here, as the feoffments of the tenants for life determined their estate, and title of entry was given for the forfeiture, when those in the future

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remainder were not *in esse* to take it, the remainders are void, there being no difference where the particular estate determines by the death of the tenant for life and by forfeiture. If the son of Christopher had been born at the time of the forfeiture, he might have entered. Thus they held there was no difference in this point between estate in possession and in use; and in this the two dissenting judges agreed, contrary to the opinion in which all the judges, except *Dyer*, concurred in the above case of Lord Paulett.

The following reasons were delivered by Baron Ewens, Owen, Beaumont, Fenner, Clark, Clench, the Lord Anderson, and Popham chief justice: — They held, that at the common law, as well all future or contingent uses, as uses *in esse*, would be devested and discontinued by disseisin, or such feoffment as the present, till the first estate out of which they arose was recontinued. Now the statute 27 Hen. 8. does not transfer a possession to a use generally, but to uses *in esse*, and not to uses *in futuro* or contingency till they come *in esse*, which appears by the express letter of the act; for as there ought to be a person *in esse* seised to the use, so there ought to be a use *in esse* to rise out of the estate, and a person *in esse* to take the use, before any possession can be transferred to the use; for if the person who should take the use be not *in esse*, or if the person be *in esse* and no use *in esse*, but only *a possibility* (as Lord Anderson called it) *of a use*, there can be no execution of the possession to the use. Thus, if there could be no use at common law, if there was no seisin to it, so, since the act no use can be executed without a seisin, and of course a person capable of the use, for the statute speaks expressly of *persons seised*, and to the *use of any person*. Again, they remarked, that the act speaks only of persons having a use in possession, reversion, or remainder, without any word of *possibility* or *contingency*; therefore, persons *in esse* are only within the act; and no estate is devested out of the feoffees, but when it can be executed in the *cestui que use*. And they

said, those who argued on the other side had dropped half the sentence; for they only said the estate should be out of the feoffees, to which they should have added, that it should be in the *cestui que use;* but that they saw, or at least it was plain from the statute, could not be, till the person and the use also came *in esse.* They said, therefore, that it appears from this clause that no estate of the feoffees should be transferred in abeyance, and vested in nobody, or be transferred to a possibility of a use that had no being.

They said, that the feoffees, since the statute, had a possibility to serve the future uses when they came *in esse,* and that in the mean time all the uses *in esse* should vest; and when the future uses came *in esse,* then the feoffees (if their possession was not disturbed by disseisin or other means) should have sufficient estate and seisin to serve the future uses; and they said the seisin and execution of the use ought to concur at one and the same time.

This case, they said, was not to be resembled to cases at common law, for an act of parliament might make a division of estates, and therefore it is not necessary the feoffees should have their ancient estates. This, they said, was just and consonant to reason; for by this construction the interest and power that every one had would be preserved by the act; for if the possession was disturbed by disseisin or otherwise, the feoffees would have power to re-enter and revive the uses according to the trust reposed in them: and if they bar themselves of their entry by any act, this not being remedied by the act would remain at common law. But at any rate no use could arise to persons not *in esse* till the impediment was revived, and the estate of the feoffees was recontinued.

They said, if such a construction of the stat. 27 Hen. 8. was admitted, as was made by those who argued on the other side, so as by the equity of it to maintain and preserve future uses, greater inconveniences would be introduced than those complained of before the act. It would in effect be establishing a perpetuity of estate, with all those griev-

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ances which had been so long felt from the statute *de donis*, if they continued undisturbed; but if they were broken in upon, all those mischiefs would happen which were complained of respecting uses before the act; such as dormant claims and insecure title. This topic of perpetuities they thought sufficient reason to determine the question upon, if they had not had the ample grounds of law, upon which they had endeavoured to found their decision. (*a*) (1 Rep. Chudleigh's case.)

This is the substance of the reasons given by some or other of the judges who were of opinion against the contingent use. The arguments on this great question have been given more at length than we have usually allowed ourselves, on account of the great importance of the subject; and because this case became afterwards a leading decision not only on uses, but on all contingent limitations.

In tracing the progress of uses, the next subject that presents itself is *a covenant to stand seised to a use;* a conveyance which has frequently been mentioned already, and which, after long doubt and several discussions, had at last been recognised by the courts as a legal title to a use. But the validity of this conveyance depending wholly upon the consideration that moved the grantor to make it, an opening was still left for argument; and the sufficiency of the consideration was debated with almost as much difference of opinion as the covenant itself had been in former times. In the eighth year of the queen a case happened, where, after some argument on both sides, certain principles were laid down which have governed ever since; this was in *Sharrington* v. *Strotton*. An indenture of covenant had been made, expressing the grantor's wish that the lands should continue and remain in the family name of

(*a*) The opinions of the judges as collected and blended by Lord Coke are not, perhaps, the most satisfactory part of his report. The whole subject is treated with more method and perspicuity in the argument which precedes them; and which, probably, was his own argument in court, as counsel against the contingent use.

Baynton: for the good will, brotherly love, and favour which he bore to his brother, he made several limitations in favour of his brother and his brother's wife, and then of his own male issue.

This covenant was brought in question, and several objections were stated to it. It was maintained that no use was conveyed to the brother by this covenant. The grantor, if he wanted to convey any use to a stranger, should have taken one of these two ways: either to part with the possession by a feoffment, fine, or recovery; or to keep the land in his own hands, and yet do some act which, because it imported in itself a good and sufficient consideration, would cause the use of it to be to another, as a *bargain and sale*, or covenant on consideration: as a bargain and sale for money, or a covenant, if the covenantee will marry the covenantor's daughter; the one was a benefit, the other a satisfaction and comfort, and so held by the law to be a good consideration, and such was always necessary to create a use *de novo*, where there was no transmutation of possession. But the causes mentioned in the present deed were not such. The 1st was, That the land might descend to and remain in the heirs male of his body; 2dly, That they should continue in the name of Baynton; 3dly, The good will and brotherly love and favour he bore to his brother.

They said, none of these imported any recompence to the covenantor; and, therefore, it was a sort of *nudum pactum*: they said, there should be an act done, or some new cause, as to marry, or the like; but here the issue male of the covenantor, his name, and blood, and brotherly love, all those were not the less so, if there had been no covenant. They said, the law required some new cause as the occasion in consideration of these covenants; that estates as they, at common law, passed by so notorious an act as a feoffment was, might not be passed in secret by these new-fashioned deeds; and if the makers of the statute of *enrolments* had not thought that some notoriety of consideration was necessary to give legal validity to these *covenants*, they would have

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required them to be enrolled, the same as *a bargain and sale.* They quoted and relied upon the determination in the reign of Henry the Seventh, (21 Hen. 7.) against these covenants, (Plowd. 302.)

The other side of the question was supported by the famous Plowden, whose argument is at length in his Report; and there he maintains the above three causes of the deed to be sufficient considerations to raise a use; in support of which opinion he is not content with such topics as are furnished by our own law, and the favour and preference which it shows, in many instances, to such relations and ties, but travels into Aristotle and the Old Testament for the rules of natural and divine law upon this subject. However, as the above were considerations that had a new appearance, he called in the assistance of another, which was better known in our courts, and said, that the covenant was founded upon a fourth consideration, which was the marriage of his brother; for it is evident, though not so expressed, that the deed was made for securing a jointure to his wife. They admitted, that in the case in 21 Hen. 7. no use could be raised, because it was future, and also uncertain; but this was very different. So confidently did he rely upon the goodness and sufficiency of the considerations here alleged, that he said they would raise a use even without a deed.

But they went further, and said, that admitting the considerations to be insufficient, or admitting that no consideration had been expressed, yet the covenant of itself would be sufficient to raise the use. For the party could have no advantage from the deed, if it would not raise a use. He could not have an action of covenant, because there was nothing executory; for the covenantor had covenanted that he, and all persons seised of the land, shall be seised to the uses limited; and if they did not stand seised, there was no default in the covenantor. For an action of covenant must be for a thing done or to be done, as in the case in 21 Hen. 7. where it was covenanted the land should revert and de-

scend: but here he grants presently to stand seised; and if the law permits the uses to arise, he stands seised to them; if not, there is no default in him. Therefore, they inferred, if no advantage could be made of the deed, but by raising the uses, rather than so solemn an act should be disappointed, he said the uses should be raised; and if they objected that there was not sufficient consideration, he went further and said, that though in contracts by parol a consideration ought to be made appear, yet, where there was a deed, that was an act of such deliberation, that it imported a consideration in itself; as a bond charged the obligor without any enquiry into the cause of it, so, he said, ought this deed; and this he supported by many old authorities. The court gave no opinion upon this point or the marriage, but held clearly the three considerations to be sufficient causes to raise the use. (Plowd. 303—309.)

Plowden's opinion, that the above considerations would raise a use without a deed, was debated in court some few years afterwards. A father, upon a treaty of marriage of his younger son, promised the relations of the wife that, after the death of himself and his wife, the son should have the land to him and his heirs; the man was seised in demesne, and not in use, and it was held by all the four justices of the Common Pleas that the use was not changed by such *nude* promise. This is called a nude promise, because the special verdict stated that it was without consideration *ex parte mulieris;* but when it also states, that the marriage was had, it is difficult to say, upon the principle of the cases that had already been determined, that this was no consideration. (12 & 13 El. Dyer, 296. 22.) This question, whether a freehold should pass by parol, on consideration of marriage, had been agitated in the reign of Edward the Sixth, when all the justices agreed that it should: conformably with this opinion, in the case of *Collard* v. *Collard*, some judges argued in favour of a use so raised; but when that same case came into the Exchequer Chamber, in the 38th of the queen (Poph. 47.), it was strongly denied (2 Anders. 64.); though it was, in the mean time, in 37 El.,

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as strongly held in *Corbin* v. *Corbin*, by three judges, that a use might be raised by parol on such a consideration. (Dyer, *ibid.*)

By the decision in *Sharrington* v. *Strotton*, a covenant to stand seised was rendered a more general conveyance than it was before: it was more usually confined to cases of marriage; it might now be applied on all occasions of a family-nature to settle estates. However, the courts seemed inclined to keep it within the bounds that had now been set to it. Therefore, where persons attempted to extend it further, by stating *other good causes and considerations* as a ground for the grant, they held that these words were too general to raise a use, unless some special averment could be made that valuable, or other good consideration was given. Again, they would not suffer uses to be raised to persons named in the deed, if they were not within the considerations that had effect with regard to others. Thus, where Lord Paget covenanted, in consideration of blood, payment of his debts, and discharge of his funeral expenses, to stand seised to the use of *B.* during the life of the said Lord Paget; and after his death to the use of *D.* for twenty-four years, for payment of his debts and funeral expenses; and after the end of that term to the use of his eldest son in tail, it was adjudged that the term was void, because it wanted a good consideration. For *D.* not being executor, and so not liable to the payment of debts, he was not privy to the consideration in the deed. (In the Rector of Cheddington's case, 1 Rep. 154.) Where a person covenanted, in consideration of blood, to stand seised to the use of himself and the heirs male of his body, with remainders over to his brothers, and remainder in fee to the queen, it was held, in *Wiseman's* case, that the queen took no estate, because she was not within the consideration mentioned. (Wiseman's case, 2 Rep. 15.)

Provisoes; revocations.

It was no uncommon thing for a deed conveying uses to have a proviso, enabling the maker of the estate to *revoke* the present disposition thereof, and declare a new limitation

of the uses. This was an improvement on this new method of ordering property, and seems to have first been attempted in the beginning of the present reign; for there is no question in our books upon these deeds of revocation till past the middle of this reign, and those are all upon deeds made a very few years before. One of the first instances of any debate upon this new device is *Albany's* case, which was decided in the 28th of the queen. A man there had enfeoffed certain persons to the use of himself for life, with remainder over, in which there was a clause, providing, "that if *A.* died without issue male, *it should be lawful for him, at all times, at his pleasure, during his life*, by deed indented to be sealed and delivered in the presence of four credible witnesses, to alter, change, determine, diminish, or amplify any of the uses limited in the said feoffment." These were the terms on which this power of revocation was usually reserved. The feoffor after this made a feoffment to other uses, and after that he made a deed in which he renounced to the feoffees, and *cestui que use* in the first deed, the power of revocation he had after the death of *A.*; he therefore *released* to them the said proviso and covenant, and further granted to them that the said power and authority should be null and void, which was putting it in as full a way as it could be worded. After argument upon the effect of the feoffment, it was resolved by *Wray* Chief Justice, after conference with Anderson and other justices, that a power to revoke as well as to limit new uses may be extinguished by a fine or feoffment; and he was inclined to think that the release also entirely extinguished the power; but at length the court agreed, that if the power of revocation had been present as the provisoes of revocation usually were, it might have been extinguished by *a release* made by him who had the power to any who had an estate of freehold in the land, in possession, reversion, or remainder; and so the estates which were before defeasible by the proviso would by such release become absolute. When this second deed could no longer

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be effective as a release, they argued it as a *defeasance*, and the whole court agreed that it was; and that it was reasonable that the proviso might be annulled by the same parties as were concerned in the making, and in the benefit of it; they therefore determined that the above was a *defeasance*, which defeated and annulled as well the covenant which created the power as the power itself. (*Albany's* case, 1 Rep. 110.) It is evident from the report of this case that the whole of this was a new topic in the courts; the arguments being founded on the analogy of some old common-law cases of release of covenants, conditions, warranties, and the like.

In all these cases persons were held to a strict adherence to the terms of their deeds. In *Digge's* case, the proviso was, to make the revocation "by deed indented to be enrolled in any of the queen's courts." The person authorized made the revocation, but expressed in the deed that it should be enrolled in the Chancery; instead of which it was enrolled in the Common Pleas; and then he levies a fine, and after that the deed was enrolled in Chancery, as it should have been at first. Upon this, it was the opinion of the court, that the deed was not a perfect revocation till it was enrolled; for notwithstanding the proviso of revocation would be satisfied by an enrolment in *any* of the queen's courts, yet as the deed of revocation limits the revocation to take effect after the enrolment in Chancery, that must be complied with before it can be said to be complete; and then, consistently with the resolution in Albany's case, they determined that the fine, coming before the revocation, wholly extinguished the power of making it.

The court, in this argument, came to several resolutions on the nature of these revocations. They confirmed what was said concerning a release in Albany's case. But *Popham* Chief Justice said, if a feoffment was made by *A.* to certain uses, with proviso, that if *B.* shall revoke the uses should cease, there *B.* could not release the power. They

resolved, that other uses might be limited or raised by the same conveyance which revoked the ancient one; for inasmuch as the ancient uses ceased *ipso facto* by the revocation, with claim, entry, or other act, the law will adjudge a priority of the operation of one and the same deed; so that it will be first a revocation of the old, and then a limitation of the new. They also held that, in this case, where the proviso was to revoke "*at any time during his life*," he might revoke part at one time, and the residue at another, till he had revoked all; but he could revoke one part only once, unless he had a new power of revocation annexed to the uses newly limited. (42 El. Digge's case. 1 Rep. 173.)

The attainder of Sir *Francis Englefield* gave occasion to a very singular question upon a revocation. He had covenanted to stand seised to the use of himself for life, remainder to his nephew in tail, remainder to himself in fee; and because he did not think it convenient that this settlement should remain absolutely in his nephew, who was then young, and his *proof* not yet seen, it was provided that if the uncle, by himself, or by any other, during his natural life, deliver or offer to the nephew a gold ring, to the intent to make void the uses, that then they should be void. This deed was made in the 18th of the queen, and in the 26th Sir *Francis* was outlawed for treason. And it became a question whether this was not such a condition as should be given to the queen by stat. 33 Hen. 8. c. 20. In the 31st year, letters patent had issued to two persons, authorising them to make a tender of a ring to the nephew, which they accordingly did, and read to him the patent, but he refused it: all this being certified into the Exchequer, it came on to be argued on an information of intrusion. It was objected on the part of the nephew: 1st, that this was a condition annexed to Sir *Francis* with such inseparable privity, that it cannot be given to another, as it depended on his opinion of the young man, whether thought worthy to retain the estate intended him or not: 2d, they said, by the

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33 Hen. 8., only conditions separable, and such as might be performed by others, were given to the king: 3d, they said, that though the benefit of the condition might, perhaps, be given to the king, yet the performance, that is, the tender of the ring, must be by the covenantor only.

To this it was answered, and agreed by the whole court, as to the two first objections, that the whole force and effect of the condition consisted in the tender of the ring; and as to the cause and intention of the covenantor, which induced him to reserve the same power as a bridle in his own hands; that, they said, was no part of the proviso, but a *flourish*, as the chief baron called it, and preamble; for nothing was part of the condition but what came after the proviso, and that was the tender of the ring. And as to that, the distinction above made was admitted by the whole court, between conditions personal and individual, which could not be performed by any other, and those which were not so inseparably annexed to the person, but that they might be performed by another. Thus, they said, it had been resolved in the case of the Duke of *Norfolk*, who in 11 El. conveyed his lands to the use of himself for life, and afterwards to the use of his eldest son, *Philip* Earl of *Arundel*, in tail, with divers remainders over; with this proviso, that he might alter and revoke the use, upon signifying his intention *in writing, under his proper hand and seal, and subscribed by three credible witnesses.* The duke being attainted of treason, it was held this condition was not given to the queen by the statute, because the performance of it was personal and inseparably annexed to his person; as none could signify the duke's mind under his hand but the duke himself. And, upon this point, all the lands so settled were saved from forfeiture. But, in the present case, they said, any other person might tender the ring as well as Sir *Francis*, the same as in the payment of money, delivering gilt spurs, and the like. Then, as to the third point, they said, when the statute gives the condition to the king, it gives the per-

formance also; for it puts the king in the place of the person attainted.

It is said, that in the argument many cases were adduced of persons attainted of treason, who had power of revocation; and upon full consideration and comparison of them, the court gave judgment for the queen. The counsel, it is said, were very dissatisfied with this decision, considering the condition as inseparably annexed to the person of Sir *Francis*; and they advised a writ of error. But, in the next parliament, which was the 35th El., a special act was made to establish the forfeiture. (Sir *Francis Englefield*'s case, 7 Rep. 11.) So little confidence had they, that the point might be readily admitted for general law, which many lords were, perhaps, by the terms of their settlements, interested in; and which, perhaps, they might think they weakened instead of confirming by a special statute against an obnoxious offender and an outlaw.

Another instance, in which the crown felt an interest arising from these revocations, was where a fine was due from a tenant *in capite* for alienation. The Viscount *Montague* had obtained a licence to alien to *A.* and *B.*: he afterwards covenanted with *A.* and *B.* that they should recover certain lands against him to certain uses, with a power to revoke those uses and declare others, by any writing, during his life, or by his last will, and that the recoverors should stand seised to the new uses. By his last will he revoked the uses, and declared new ones; and it was resolved by the judges that, in the first place, no fine was due for the estate executed in the *cestui que use* by the statute; and, 2dly, that none was due for those newly declared in the will. For notwithstanding the king's tenant was altered by these new limitations, yet there being a licence to alien to the recoverors was enough, for all the uses arose out of their estate. (43 El. the Viscount *Montague*'s case, 6 Rep. 27.)

Sometimes these *provisoes* did not give authority to revoke the whole of the settlement, but only part of it, and that

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for particular purposes: these were provisoes which have since been better known by the name of *powers;* and certain restrictions were imposed on them, similar to those by which the raising of the original uses was governed. *Mildway's* case, in 24th of the queen, gave occasion to the nature of powers being better explained. A person there covenanted in consideration of blood, and other good and just considerations, to stand seised to the use of himself for life, with several limitations, by way of portion to his daughters and their husbands in tail; to which was added this *proviso:* that he should be at liberty, by will, in writing, to limit any part of the land to any one for life, lives, or years, for payment of debts or legacies, preferment of servants, or any *other* reasonable consideration, as to him should seem good; and all persons seised should stand seised thereof to such uses as he should so appoint by his will. In pursuance of this power, the covenantor did, by his will, give a great part of that which had been before limited, for a portion to two of his daughters, for the advancement of another named *Plyff* and her husband, and the heirs of her body, for one thousand years, without reservation of any rent. And, after long argument, it was resolved by all the judges that where uses are raised on consideration of blood, &c., and a proviso is added that the covenantor, for divers good considerations, may make leases for years, the covenantor cannot make leases for years to any of his blood (much less to any other person), because the power to make leases for years was void, when the indenture was sealed; for the covenant upon such general consideration cannot raise the use; and no particular averment could in this case be admitted, because his intent was as general as the consideration was, namely, to demise to any one whom he pleased. But if it was upon a feoffment, fine, or recovery, there, as no consideration was necessary to raise the uses, it would be different. Again, in the present case, the power to make estates would defeat or encumber those already made on good consideration. Further, they held, that *other* con-

sideration must mean other than the advancement of a daughter, which was mentioned before. And, further, they held the term for one thousand years to be against the intent of the parties, and the words of the proviso; for the design being to provide for all the daughters, this term tended to encumber and frustrate the portions already given. 24 El. 1 Rep. 175.)

Pleading.

Whoever compares the pleadings of this reign with those of the two former, and of Henry the Seventh and Henry the Eighth, will not find any very material difference. The formal part of pleading was much ancienter than any of those reigns; and the most approved style had been settled either before or during that time, so that in the actions mostly in use there was little room left for improvement. *Debt*, *detinue*, *trespass*, *replevin*, *covenant*, all these being old remedies, their pleading was long ago debated and agreed upon.

But actions upon the case were of a later date, the constitution of which had not been sufficiently experienced, nor the power and direction they would take, and were capable of, fully comprehended. It was natural, therefore, that the pleading in these new actions should be as yet fluctuating and various.

The answer given to declarations in case, whether those that were grounded on a *contract* or *tort*, were sometimes special matter, concluding with a traverse or a kind of general issue (Cro. El. 147. 634. *et passim*), as was stated to have been the practice in the preceding reigns; but more frequently the general plea of *non assumpsit* and *not guilty*. (Cro. El. 130. 625. 923.)

As to the action of *assumpsit*, so closely did they adhere to the supposition of an *actual* promise, that where the jury found the promise on a different day from that laid, it was held not to support the declaration. (Cro. El.) Again, as it was made a substitute for the action of debt, they resolved it should, in one instance, be tied down to the rule which governed in that: for where the declaration was for 50*l*., and a verdict was for 47*l*., and as to the residue, the jury

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found that he did not promise, the verdict was set aside; *because* damages were assessed to a lesser amount than the sum alleged to be due. (Bagnall and Sacheverell, Cro. El. 292.)

The old pleading in trover still continued, but drew from the courts some opinions which naturally led to certain alterations. In 37 El. (Cro. El. 433, 434, and 436.) there are two actions of trover: in one, a sheriff was defendant, who *justified* under an execution; in the other, the defendant justified distraining damage-feasant, and set forth all the special matter: the pleas in both cases conclude *absque hoc*, that he converted them *aliter vel alio modo*. There were demurrers to them: and the plea in the first action was held bad, *principally* (434.) because there was no conversion confessed, as there should have been, conformably with the traverse; so that the court admitted the substance of such a plea to be good, if that requisite had been complied with. But, in the latter case, they said, the plea amounted to the general issue, and it should have been not guilty. (435.) However, notwithstanding these opinions had occasionally dropped from the bench, the practice continued all through this reign in all actions of trover to plead such special matter as amounted to a justification of the defendant, and so conclude to the court or with a traverse in the manner before stated. (Cok. Ent. 40 b. 41.) Both these methods were again allowed as good, the former in 38 El., the latter in 39 El. (38 El. Cro. El. 485. 39 El. Cro. El. 554.) Such repeated declarations in favour of these pleas could leave no doubt of their sufficiency; and though the general issue had been, as we have seen, as authoritatively declared good, the prevailing habit was to bring every thing to the judgment of the court by these justifications, in preference to the trial by the laygents; to which they would be subject by the plea of not guilty.

With these and some few other particular exceptions, it may be pronounced, that the general cast of learning in the days of Queen Elizabeth comes within the bulk of that

kind of law which is now in use. The long period of this reign gave sufficient opportunity for the discussion of almost every legal question; and the learning of former times being laid open to the world by the late publications, the whole of the law seems to have undergone a reconsideration as it were; and those parts which were then mostly in use were settled upon principle, and so delivered down to succeeding times. To us, who view things in the retrospect, there seems to arise a new order of things about this time, when the law took almost a new face. At this period are terminated in general our legal enquiries, as few are at the pains of looking further back than the writings of this time, or examining very minutely into the mines where the lawyers of Queen Elizabeth's days dug for their learning. We are usually content with such portion of that ancient matter, and that shape in which we receive it from them, or even from writers of a later date; and a man is esteemed no superficial reader who has collected his knowledge from this source.

When we consider Queen Elizabeth's reign in this view, it becomes a very interesting period in the history of our jurisprudence. From hence the commencement of modern law may be dated. While the decisions of the earlier periods are looked into with diffidence, and a suspicion that they may have been overruled or explained away, we find those of this reign repeatedly quoted as incontrovertible and leading authorities: they are within the compass of the student's reading, and the reference of the man of business.

Before we enter on the criminal law of this reign, it will be proper to mention a court, whose authority, though established with a view to the ecclesiastical state, may be considered as a criminal jurisdiction of the most severe kind. This was the *Court of High Commission.*

The court of high commission.

The first statute of this reign had conferred on the queen the supremacy over the church in as ample a manner as it had been enjoyed by Henry the Eighth and Edward the

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Sixth. (Stat. 1 El. c. 1. s. 17.) There is a clause in this act which empowers the queen, by letters patent, to name and authorise, as often as she shall think meet, for such time as she shall please, such person or persons, being natural-born subjects, as she shall think fit to execute all jurisdiction concerning spiritual matters within the realm; and to visit, reform, redress, order, correct, and amend all errors, heresies, schisms, abuses, offences, contempts, and enormities whatsoever, which belong to any ecclesiastical authority (sect. 18.), as a restriction on the authority of such commissioners. It was provided by another clause of the same act (sect. 36.), that no matter shall be adjudged heresy but only such as has been so adjudged by the canonical scriptures, or by the first four general councils, or by any other general council wherein the same was declared heresy by the express and plain words of the canonical scriptures; or such as may hereafter be adjudged heresy by parliament with the assent of the convocation. So that charges of heresy were not left so much at large as they had been in the preceding reign. These were the powers given by the statute.

The first commission granted under the authority of this act was in 1559, when one was made for the province of Canterbury, and another for that of York. The preamble of the commission states, that the queen intended a general visitation of the whole kingdom; and, therefore, she empowered the commissioners, or any two of them, to examine the true state of all churches, to suspend or deprive such clergymen as were unworthy, and to put others into their places; to proceed against those who were obstinate by imprisonment, church-censures, or any other legal way: they were to reserve pensions for such as would not continue in their benefices, but quitted them by voluntary resignation; to examine all those who were imprisoned on account of religion, and to discharge them; and to restore all such to their benefices as had been unlawfully turned out in the late reigns; which last two directions were in favour

of those who still lay under the weight of Mary's prosecution.

This was the first high commission: it differs from the like authority which had been delegated, in the reign of Henry the Eighth, to Cromwell, with the title of vicar-general, inasmuch as it was given to more than one person, whom it was not thought proper again to trust with such ample powers. This commission was directed to persons both clergy and lay. (2 Burn. Reform. 358.) It was of a confined nature, designed merely to assist in completing the reformation, and was restrained to the particular objects therein specified. However, exception was taken to this commission at the time: the principal complaint was, that the queen should give the visitors authority to proceed by ecclesiastical censures; which, considering some of them were laymen, seemed a great stretch of supremacy. This, on the other hand, was defended, by alleging that this was no more than the lay-chancellor ordinarily did in the ecclesiastical courts, which Bishop Burnet thinks was only making one abuse an excuse for another. (*Ibid.* 371.)

This commission expired with the occasion of it. From the year 1568, the Puritans had grown to a great number, and gave much uneasiness to the queen, who was always as jealous of the sectaries as of the Romanists. Archbishop *Grindal*, who had a bias this way, had so dissatisfied the queen by his remissness in suppressing their meetings, that he was proceeded against in the Star-Chamber, and sequestered from his archiepiscopal functions. When *Whitgift* succeeded him, he informed the queen that the spiritual authority of the bishops was not sufficient without the assistance of the crown. By his advice, therefore, a new commission was issued, appointing forty-four commissioners, of whom twelve only were ecclesiastics: three of the persons appointed constituted a *quorum*.

The jurisdiction of this new ecclesiastical commission extended over all the kingdom, and over all descriptions of men. The commissioners were empowered to visit and

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reform all errors, heresies, and schisms, in the terms and to the extent prescribed by the statute; and they were directed to make enquiry by juries and witnesses, *and all other means and ways which they could devise;* which seems to authorise every inquisitorial power, the rack, the torture, and imprisonment.

Besides, they were not confined to matters merely spiritual; but they had also power to punish incest, adultery, fornication, with all misbehaviours and disorders in marriage. Thus, with an unlimited authority to enquire, without prohibition or appeal, in spirituals and concerning morals and behaviour, by a summary method of trial, and with their own discretion only to restrain them, in punishing by fine and imprisonment, this court had all the appearance of an inquisition. (5 Hum. 263.) This court and the Star-Chamber constituted two engines of arbitrary power, which, perhaps, never were surpassed by any contrivance of government to keep the people in continual awe of the sovereign authority.

Criminal law.

The criminal law was reduced to a greater certainty by several decisions in this reign.

Murder and homicide.

The crime of murder and of homicide was discussed in many points of view, and settled by frequent decisions. In the 15th of the queen, a remarkable case happened at Warwick Assizes. One *Saunders*, wanting to get rid of his wife, had, by the advice of Archer, mixed arsenic in a roasted apple, and gave it to her; but she, after tasting it, gave it to a child of theirs; and Saunders, though fond of this child, did not offer to take it from her, lest he should be suspected. The child died, and the wife recovered; and, upon an indictment, it was made a question whether he was guilty of murdering the child. The justices, after some consideration, agreed that it was murder; and the reason they gave was this: that Saunders administered the poison with an intent to kill a person, and when death followed, though to another person, they thought he should be punished, rather than the death go unrevenged; for the wife, who was ignorant of the poison, was certainly innocent of the

death. And this seems consonant to the old law; for it had been long held, that if a man of malice prepense shot an arrow at a man with intent to kill, and he killed another, the crime of murder was equally imputed to him. (Plowd. 2.) The same of lying in wait for one person and killing another by mistake.

But the difficult part of this case, and that which raised most doubt with the justices, was, whether Archer should be adjudged accessory to the murder: for Archer's advice and aid was in order to kill the wife; and although it so happened that the daughter was murdered by the principal, yet he could not well be said to procure that consequential act. This matter was therefore adjourned, till the opinion of the rest of the judges could be obtained; and having depended in this manner for three years, the judges at length agreed that Archer was not accessory to the murder: for the murder of the daughter being a distinct fact from what he had contrived, they thought his assent should not be drawn further than he gave it. But rather than make a precedent of this judgment, it was never delivered, but the offender was respited from time to time till he obtained his pardon. (Plowden, 473.)

This opinion of the judges on Archer's case is approved by Plowden, who thinks it reasonable that he who advises or commands a thing to be done should be judged accessory to all that follows from that thing, but not from any distinct thing; as if I command a man to rob another, who resists, and, a combat ensuing, the robber kills him, I shall be accessory to the murder; because, as he was pursuing my command, I was in all reason a party to every thing that happened in the execution of it. So, if I command one to beat a person, and he kills him; or to burn a man's house, and in consequence of that another takes fire, I am accessory to the fact which happened (and in the nature of things was likely to happen) in consequence of the first. But if I command him to burn the house of *A.*, and he burns the house of *B.*; or to steal a horse, and he steals an ox; or to rob

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such a goldsmith while at Sturbridge fair, and he robs his house in Cheapside; these are distinct facts from those I gave my assent to, and therefore I am not in law accessory thereto. Yet if I command one to kill another by poison, and he does it with a sword; or to kill him in the fields, and he does it in the city; or to kill one day, and he does it another; there I am still accessory, because the death was the principal matter, and the other but form and circumstance. However, if I command a person to do a felony, and afterwards charge him not to do it, and he does it, I am not accessory thereto, though I should be accessory if he had done the fact before, notwithstanding any secret repentance of mine. (Plowd. 475.)

The distinction between murder and manslaughter still occasioned some confusion, in consequence of which there is discoverable a want of uniformity in the practice of different judges; some considering them as distinct offences, others as two names for the same offence: it is only upon this difference in the conceptions of lawyers on this subject that we can account for some singular passages in the reports. In the ninth of the queen, a man being appealed of felony and murder, was acquitted of the latter, and found guilty of the felonious killing: upon this *Dyer* says, it was a doubt in the Queen's Bench whether, upon this verdict, the defendant should be discharged of the appeal, though he could not read as a clerk; that is, whether an acquittal of the murder was not an acquittal of the whole offence charged; this was upon the idea that the murder and manslaughter was the same crime. But the court seem at last to have agreed, that he should be burnt and imprisoned for the manslaughter, as they made it a question whether the queen could pardon the burning. (9 El. Dyer, 261. 26.) Again, in 25 El., on *Darley* being appealed of murder, was found guilty of homicide, and has his clergy, as in the above case; but afterwards an indictment was preferred against him for murder, as if his former conviction for homicide did not include the offence he was now charged with. But the court

there held, that the former conviction was a good bar to this indictment: they emphatically declared, that it was a good bar at common law, and restrained by no statute; intimating, probably, the reason upon which the contrary opinion might be founded: they said, it was one fact, and no man's life should be twice put in jeopardy for one and the same offence. (4 Rep. 40 a.)

Several years after this, in the case of *Wroth* and *Wigges*, in an appeal of murder, another difficulty arose; for the evidence being, as the court of King's Bench thought, such as to convict him of manslaughter, the jury gave a general verdict of not guilty of the murder; and being asked if he was guilty of the manslaughter, they answered, they had nothing to do to enquire of that. The court being staggered with this answer, sent Justice *Fenner* to consult the judges of the Common Pleas how to act, who thought the jury were not compellable to enquire of the manslaughter; upon which the verdict was taken, and the prisoner discharged. (Cro. El. 276.) Much of this puzzle arose from the term manslaughter being originally a generic expression, including murder as well as other sorts of killing, and therefore it was improperly applied to a species or sort of killing; for which reason they had lately invented the term of *chance-medley* to supply this modern application of it. A very correct writer of this reign takes notice of this confusion (Lamb. Iren. 218.), and says, that he shall use the word manslaughter, as Bracton and Staunforde had rightly done, as a general expression, including as well murder as other degrees of killing; and he discovers some indignation at those *unskilful* men (as he calls them) who now-a-days would needs restrain it to manslaughter by chance-medley.

The new distinction between murder and manslaughter led to a singular construction being put upon stat. 3 Hen. 7. c. 1. In the 20th of the Queen, one *Holcroft* was appealed of murder, and in bar of the appeal he pleaded an indictment for manslaughter, and that he confessed the indictment.

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Now, notwithstanding, at the time of making that statute, murder and manslaughter were in law the same thing, they resolved, clearly, that a conviction of manslaughter, and clergy had, was a bar to an appeal under that act, upon the idea, probably, that clergy being taken from one attainted of murder, to give the statute some force, it should be construed to mean such attainder for killing as might have clergy, which was manslaughter. In this case they also came to some material resolutions upon the wording of the act: for it was objected that the defendant being neither *acquitted* nor *attainted*, he was not within the letter of it. But they resolved the bar to be good at the common law, and not restrained by the act; for if the defendant had had his clergy, then the appeal would not lie; and if he is *attainted*, and has his clergy, it is excepted out of the act, and left to the common law, *à fortiori*, if he is *convict*, and prays his clergy. They said, that the words *attainted of murder* should not be intended only of a person who had judgment of life, but also one *convicted* by confession or verdict; for one attainted is a person convicted, and more; and if it did not extend to persons convicted, the whole purview of the act would be lost. Thus, stat. 25 Ed. 3. c. 2. says attainted by verdict, which means only convicted by verdict; and it was commonly in our old law books, to confound conviction and attainder. They thought it singular that the appeal should not lie against persons *convicted*, when the statute allowed it against persons acquitted. Again, they said, that though the statute speaks of the *heir of him*, yet it had been determined in the case of one *Agnes Gainford* that the heir of a *woman* should have an appeal under this act. (1 Anders. 68. 4 Rep. 45 b.) The same point as the above was again decided in *Wrothe* v. *Wigges*, in the 34th of the queen.

It was laid down by the whole court in *Young's* case, that if the constable and others assisting him come to suppress an affray, and preserve the peace, and he or his assistants are

killed, the law will construe it malice and murder; although the murderer did not know him, and though the affray was sudden, because they acted under authority of law: the same of a bailiff executing process, or a watchman doing his duty. (4 Rep. 40 b.)

Of manslaughter and chance-medley.

It seems the term manslaughter had begun in this reign to receive the sense it bears at this day; but this was not established as the technical sense of it admitted by all lawyers. The writer whom we have before quoted (Lamb. Iren. 218.) says, he shall use the word manslaughter as a general expression, including as well murder as the other degrees of killing; however, *unskilful* men might restrain it to manslaughter by *chance-medley*. (*Supra*, 221.)

After this observation on the change which had lately taken place in the meaning of this term, he proceeds to consider this offence in the following way:—Manslaughter might happen in four ways: it might be such manslaughter as is *allowed by law*, that is, upon a certain necessity, in execution of justice, in defence of one's house, goods, or person (Ibid. 230.); or it might be manslaughter upon *premeditated malice*, commonly called *murder*, and in some special instances *petit treason*. Murder was defined to be, where one man of malice prepense killed another feloniously that liveth within the realm, under the protection of the queen (as it was then), whether it be openly or privily, and whether the party slain be English or alien; which latter specification referred to the old notions comprehended in this term in the days of Glanville, Bracton, and the later times down to Edward the Third. The two other kinds of voluntary homicide without preceding malice are stated to be, the one that commonly called *manslaughter*, but more properly says this writer (Lamb. Iren. 245.) *homicide by chance-medley*; the other is *se defendendo*. The former was so named, because it signified a killing when people were *meddled*, or committed together by mere *chance*, upon some unlooked-for occasion (Ibid. 244.), without any former

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malice. The latter is a killing in *one's own defence*, however, not such a one as is justified as those mentioned above under homicide allowed by law; nor again such as is attended with circumstances of heat and sudden affray, as that before mentioned. The last of all is *manslaughter by misadventure*, which explains itself in the very terms of it. (Lamb. Iren. 250.)

Burglary.

The crime of burglary gradually became more accurately defined, and the circumstances constituting it more nicely ascertained. In the 26th year of the queen, it was agreed by all the judges assembled at Serjeants' Inn, that if one broke a glass in the window of a mansion-house, and drew out carpets with hooks, and took them away feloniously, this, if done in the night, was burglary, though the person doing it neither broke nor entered the house in any other way. The above case had been put to the judges for the information of the justices of assize in the county, where such a fact was to be tried. At the same time it was moved, whether, if thieves came in the night to a mansion-house, and the owner being therein opened the door, and when he appeared, one of the thieves, intending to kill him, shot at him with a gun, and the ball, missing him, broke the wall on the other side of the house; and it was agreed by them all, that this was no burglary. But it was to have been held to be burglary, when a person, in the night, intending to kill another in his house, broke a hole in the wall of the mansion, and perceiving where the person was, shot at him through the hole with a gun, and missed him. Again, where one had broke a hole in a wall, and perceiving one who had a purse of money hanging at his girdle coming by the hole, snatched at the purse and took it. And likewise another case was mentioned, where one came to the study-window, and seeing a casket with money, he drew it to the window, and took the money out. All these had been adjudged to be burglary; which the justices approved, considering them as amounting in law to a breaking, which being at night, and for the pur-

pose of committing a felony, was burglary. But the shooting with a gun in at the door, and the breaking the wall with a pellet, they said, neither of these was a breaking of the house with an intent to commit felony, and, therefore, no burglary. (26 El. 1 Anders. 114.)

We are told it was holden by Anthony Browne, Sir Edward Montagu, and Sir Robert Brooke, if one do but make an attempt by night to enter into a house to commit a robbery, if he turn a key, being of the inner side of the door, if those within, upon a burglarious attempt being made, shall cast out their money for fear, and the assailants take it away, the offence of burglary was complete. (Lamb. Iren. 257.) These opinions seem very like the notions that prevailed in the reign of Edward the Third (Lib. Ass. 27. pl.), when an attempt to commit an offence was considered equally criminal with the offence itself. However, they were now explained upon other grounds; and, as little as they might in fact amount to the circumstance they were construed to be, they were looked on by the eye of the law as *breakings*, and not bare attempts. There seems to have been some inclination to reject the idea of a mansion or dwelling, and to hold the breaking of any house to be burglary. In support of this, they quoted and produced precedents of indictments in the reign of Henry the Seventh and Eighth, and upon these indictments they said the prisoners had been hanged. (1 Anders. 302.) Whatever might have been the opinion of judges then, and before that time (2 Parl.), it was the more common idea now that it should be *domus mansionalis*. Upon this subject it was held by *Wray* Chief Justice, if a man has a mansion-house, and he and his whole family upon some accident are part of the night out of the house, and in the mean time the house is broke to commit felony, this would be burglary; and further, it was the opinion of Popham and all the judges, that where a man has two houses, and dwells sometimes in one and sometimes in another, and has a family and servants in both, and in the night when his

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servants are out the house is broken by thieves, this was burglary. These resolutions show it was a settled point that the house should be a dwelling-house. (4 Rep. 40.)

Thus far of the breaking a house, and the manner of it. It was not so precisely agreed what should be called *night* so as to make the offence burglary. It was doubted by Lambard whether the twilight should be reckoned as a part of the day or the night: he observes that the law has not been uniform in its judgment upon this discrimination between day and night. We find that the time between sunset and the entire departure of light was considered as a part of the day, when an amercement was to be laid on a town for the escape of a murderer who had done the fact within that period of time. (Fitz. Coro. 293.) On the other hand, the statute of Winchester, in speaking of the watch, says, it shall continue all the night, namely, from sunsetting to sunrising; considering the twilight both at morn and evening as part of the night. (Lamb. Iren. 257.) There was, therefore, no analogy in the law to ascertain what should be the time of the twenty-four hours that should be considered as *noctanter* on an indictment for burglary, nor is there any resolution in our books on this point, during the time of which we are writing.

We have seen that the definition of robbery as given by Staunforde in the last reign contains no more than a felonious taking from the person of another against his will. If that author is correct in what he there states, the idea of this crime had begun to alter very soon after his time: for very early in this reign, where a person was convicted on an indictment for feloniously taking from the person *in viâ regiâ*, he was allowed his clergy; for it was held to be no robbery, if the person is not put in fear as by assault and violence. (5 El. Dyer, 224. 30.) And this notion of robbery became now the prevailing and settled one; for in the latter end of the queen, robbery is defined to be a felonious taking of any man's goods from his person, *to his fear*, and against his will, to the end to steal them. (Lamb.

Iren. 263.) So that fear was to be caused in the person robbed, otherwise it would be only a common larceny.

The definition of larceny which had been given by Bracton, and which, notwithstanding the law was materially altered, was retained by Staunforde in defiance of all the reports for many years, was now wholly rejected. Larceny, says Lambard, is a felonious and fraudulent taking of another man's personal goods (removed from his body or person, for then it became, under certain circumstances, a robbery as was just mentioned,) without his will, to the end to steal them (Lamb. Iren. 268.); a definition that approaches nearer to that of my Lord Coke, which has been followed ever since.

In this manner crimes, with regard to the legal description of them, were, by degrees, reducing themselves to the compass in which they appear in our days. In some we have seen the old description retained in substance, though altered in the terms; in others, the vagueness of the old description is corrected and restricted; in others, the very notion of the crime is narrowed; so that the extent of offences, and the conclusions of law upon them, became much more certain and defined.

New commission of the peace.

A new and reformed commission of the peace was settled in this reign. The commission had been successively stuffed with new statutes, the subjects of which had been occasionally submitted to the jurisdiction of the justices. These had now grown to a great bulk, and were still retained there, though some of them were repealed or obsolete. This added, unnecessarily, to the size of the commission. Besides this, it was otherwise full of defects, from recitals, repetitions, and the heaping together of various incongruous matters; great part of which, too, was rendered unintelligible by repeated errors in the penning of it. (Lamb. Iren. book 1. chap. 9.)

This was the state of the commission when a representation was made to Sir Christopher Wray, then Chief Justice of the King's Bench, who communicated with all the

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judges about reforming it. After full consideration, the commission was at length carefully revised in Michaelmas term, 1590, and a new form agreed on. This being presented to the chancellor, as a model to be uniformly issued through the whole realm, he accepted it accordingly, and sealed it; and the same has continued ever since.

The plan of this new commission was to comprehend, under words of general description, all those particulars which were before specified from a number of statutes. The first clause by which they are assigned justices of the peace includes, virtually, in it all the powers of the conservators at common law; to which is added "all the statutes and ordinances made for the conservation of the peace," which includes every thing that used before to be particularly specified. The second clause gives them authority as justices to enquire, hear, and determine all the offences therein recited. So that this great charter, if it may be so called, of the authority and power of the justices of the peace, was conceived in terms of a general and intelligible import, setting forth at large the general trusts reposed in them, whether to prevent, enquire, or punish.

The queen and government.

The executive power in the hands of Elizabeth lost none of its ancient prerogatives; but, being in general exerted for the advancement of national designs and the benefit of the people, and at the same time tempered by the prudence, if not gentleness, of her own conduct, assumed a milder appearance than it had carried in the last reign.

She, as her sister had before done, continued to levy the duty of tonnage and poundage before it was granted by parliament, besides an additional duty of four marks upon each ton of wine imported, which had been arbitrarily imposed by Mary. As the sovereign, during these times, pretended to the exclusive right of regulating foreign trade, a tax like this might be considered as imposed by the proper authority. (5 Hum. Note A.)

At a time of public danger, when the Armada was in the Channel, the people were called upon to contribute towards

the general defence; the commercial towns were required to furnish ships to reinforce the navy; the queen demanded loans of money for the present exigency: all which may be excused by the necessity of the occasion, and should not be imputed to any wilful intention to violate the privileges of the people. Indeed, in this article of taxation, the queen was very moderate, and even fastidious. At the beginning of her reign she had declined a grant, because she thought the parliament expected, in return, some concessions which she was not disposed to make. In the same spirit she acted through her whole reign, choosing rather to confine herself to great frugality in her expenses, than to be obliged to parliament, who had begun to be troublesome to her, or venture on unfair means of raising it. However, the parliamentary grants towards the close of her reign, while the Spaniards were hovering round the coasts, far exceeded any that had been made to her predecessors.

In other points of her prerogative, she was more resolute and firm. At the opening of her reign, before any statute was made for re-establishing the reformation, she published proclamations, prohibiting all preaching without license; and suspended the laws in being so far as to direct a great part of the Common Prayer to be used; and that all churches should conform to the practice of her own chapel. (5 Hum. 7.) At another time, when she was resolved to suppress the expensive way of dressing then in vogue, though she might have proceeded on some sumptuary laws then in force, made in the late reigns, she chose, as Camden calls it, *rather to deal with them by way of command*; and accordingly she issued a proclamation for every body to conform to a certain dress. But, according to that historian's account, neither this nor the laws were much regarded. (Camd. 205.)

Apprehending inconveniences from the great increase of the metropolis, she even ordered, in 1580, by proclamation, that no one should build a dwelling-house within three miles of the city-gates. (Ibid. 244.)

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A bare relation of the queen's conduct towards the Earl of Hertford and his countess will suffice for a specimen of her power, and show how little ability there was in a subject to resist the absoluteness of it. That nobleman had privately married Lady Catharine Grey, divorced from Lord Herbert, a younger sister of Lady Jane Grey. After the marriage he went abroad; and the lady soon appearing pregnant, the queen threw her into the Tower, and summoned the earl to appear and answer for his misdemeanor: this was in 1561. He returned, acknowledged the marriage, and was also committed to the Tower. A commission was issued to enquire into the validity of the marriage; which the earl not being able to prove within the time prescribed to him, was declared void. But the countess proving pregnant again, the queen procured a fine of 15,000*l.* to be put on Hertford by the Star-Chamber, with directions for stricter confinement. This continued for nine years, till his wife died, when, the cause of the queen's jealousy now being removed, the earl was released. (5 Hum. 62.)

If a nobleman of high rank and fortune was liable to such tyrannical oppression, the condition of persons in inferior stations must have been truly deplorable. Before the times of Henry the Seventh, the nobility, supported by their wealth and power, were enabled to afford protection to persons who depended on them, even against the crown, and a precarious kind of liberty was diffused through the nation. But things had from that time taken such a turn, that the present nobility had become themselves the retainers of the court, where they contributed to increase the power of the crown at the expense of every thing. While they sat as judges in the Star-Chamber, they would very readily gratify the inclinations of the prince, by sentencing any obnoxious individual, and even one another, to the severest and most ruinous penalties. The courts of justice were also kept in awe by this supreme judicature; and no redress or relief could be expected from ordinary judges against the decrees of this tribunal, which would not scruple to punish such

judicial interference as the highest contempt. No remedy could be expected but from the parliament; and the queen took care to keep that assembly as much under the dread of this court and her prerogative as the meanest individual.

The first disposition the queen showed of her resolution to keep the House of Commons under control, was on occasion of the debate about the settlement of the crown, and the queen's marriage; when, hearing that the Commons had appointed a committee to confer with the Lords, she sent express *orders* not to proceed in that matter. The House were dissatisfied with this prohibition on their debates, and questioned the queen's right to interfere in this manner; till, after making one more attempt to silence them, she at length thought it prudent to allow them free liberty to debate the point. The House were softened with this condescension; but the queen soon dissolved them, with a speech which had the appearance of a severe animadversion on their conduct. (Camd. 84, 85.) This was in the parliament of 1566. In that of 1571, one *Stricland* having moved a bill for reformation of the liturgy, a subject on which the queen was always particularly jealous, as belonging only to her prerogative, he was summoned before the council, and prohibited from attending the house; but this creating some sharp debates, *permission* was sent him to appear in parliament. (5 Hum. 177.) *Robert Bell*, having made a motion against an exclusive patent granted to some merchants, was sent for by the council, and severely reprimanded. This had the effect, at the time, of making the members speak with more caution. (5 Hum. 180.) She went farther than censuring individuals. The Commons, in 1572, had passed two bills to regulate ecclesiastical matters; but she sent them a menacing message, and put a stop to their proceeding. (Ibid. 201.)

All this was submitted to with great impatience by persons who had imbibed notions of liberty not very common in those days. In the parliament of 1576, *Peter Wentworth*, who had often before, as well as his brother *Paul*, distin-

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guished himself by his resistance to such interference of the queen, animadverted in very plain terms on the imperious conduct of Elizabeth, and the shameful fear the house discovered of the privy counsellors. But the Commons had been so disciplined by the queen's former injunctions, and the treatment some of its members had felt, that they took the tone of the court, sequestered Wentworth from the house, committed him to the sergeant-at-arms, and, to show the spirit of their proceedings as clearly as possible, they ordered him to be examined by a committee, consisting of such members as were privy-counsellors. The committee met *in the Star-Chamber.* Wentworth refused to answer till they acknowledged they sat not as members of the Star-Chamber, but as a committee of the house. After he had suffered a month's imprisonment, the queen, with her usual discretion, sent to the Commons, acquainting them that, from her special favour and grace, *she* had restored him to his place in the House. Nor was the absurdity of her restoring to the House a member committed by themselves at all observed. (5 Hum. 227.)

The House of Commons, in 1580, voted a fast; for which they were reprimanded by the queen, this being an encroachment on her prerogative and supremacy over all spiritual things. They submitted, and asked forgiveness. (5 Hum. 236.) She never would suffer the House to touch on ecclesiastical matters; nor did any one escape with impunity who attempted to move any thing on that subject. In 1589, some members were committed to custody for speaking against the high commission, as were several in 1593, among whom was Peter Wentworth. The offence of this famous man was, that he presented a petition in parliament to the lord-keeper, in which he desired the Upper House to join with the Lower in supplicating her majesty to entail the succession of the crown; another was also committed for seconding it; and two others, because he had communicated it to them. *Morrice* also, who presented a bill against abuses in the bishops' courts, was seized

in the House by a sergeant-at-arms, and kept some years a prisoner in Tilbury Castle. (5 Hum. 365.)

When any debates arose in the House upon matters of prerogative, it was usual with the queen to stop them by a message which promised an alteration. This always prevented any proceeding in a parliamentary way: as it did in the question of purveyance, in 1589; and of monopolies, in 1601. (Ibid. 347. 441.)

It is related by Camden, that Peter Burchet, a fanatic, having stabbed in the streets *Hawkins*, the famous navigator, under a notion that it was lawful to kill such as opposed the truth of the Gospel, the queen ordered him to be presently executed by martial law. But she, being informed that martial-law was not to be used but in camps, and in turbulent times, he was proceeded against in the ordinary way. (Camd. 199.)

A short review of the state trials in this reign will show whether those who were dealt with according to all the forms of law were protected entirely from oppression.

Trial of the Duke of Norfolk,

The trial of the Duke of Norfolk was before the high-steward for treason. Upon request to have counsel, it was refused, because the court said it was never allowed in treason as to the fact. And when Humphry Stafford's case, in 1 Hen. 7. was urged, they answered, that was to the point of law; namely, whether sanctuary should be allowed. (1 Sta. Tri. 86.) However, the chief justice engaged for the sufficiency of the indictment, for *it had been well debated*, he said, *and considered by us all*; that is, by the judges before the trial.

The conduct of this trial was as singular as any that preceded it. One of the treasons was compassing to deprive the queen of her throne and dignity, under stat. 13 El. The duke's design to marry the Queen of Scots was considered as making him a party to such a compassing; but this was to be proved. The sergeant who opened for the crown, instead of producing evidence for that purpose, urged the duke to confess (Ibid. 89.) his knowledge of the

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Scottish queen's pretended title to the English crown; offering, if he denied it, to make proof of it. This led to some close interrogatories put by the sergeant, and explanations on the side of the duke, in which he disclosed what he knew of her quartering the arms of England. When the duke found himself pressed by these interrogations, he called upon the counsel to prove his knowledge of Queen Mary's intentions; to which he received for answer, *that he had confessed, and there was no need.* (1 Sta. Tri. 90.) The evidence against him consisted of examinations in writing, confessions of himself, and others; with a *copy* of a letter of his own, and the letters of others. This was helped on by the asseverations of counsel, and declarations which were said to have fallen from the queen's own mouth. (Ibid. 110.)

This was the evidence produced; and upon this the counsel, who were four in number, made their observations, addressed sometimes to the duke, sometimes to the court; propounded questions to the prisoner, and entered into altercation with him.

Thus was this noble personage harassed with every mode of attack, being constrained singly to stand the ingenuity and zeal of eminent advocates, enforcing a charge with a species of evidence out of the power of the accused to controvert.

The plain dictates of common sense enabled him, unlearned as he was in the law, to except to the sort of persons whose depositions were produced, that they were not credible, and confessed themselves guilty of treason. He prayed that they might be brought face to face with him, as the law of the land he trusted required; alluding, probably, to the two statutes of Edward the Sixth, of which so much has already been said. But the counsel for the crown answered, that it was true the law had been so for a time, in some cases of treason; but since, the law had been found *too hard and dangerous for the prince*, and it had been

repealed (1 Sta. Tri. 98.), meaning by the statute of Philip and Mary.

Upon such kind of trial the duke was pronounced guilty of the indictment, and was executed. Such proceedings as this, however usual they might be, were certainly not unnoticed by the world. Something like this, probably, drew from Sir Christopher Hatton on another occasion (Parry's Trial, 1 Sta. Tri. 122.) an observation, that the justice of the realm had of late been very impudently slandered. To prevent which, for the future, he seemed then to think it advisable to be very certain that the matter of the indictment, then depending before him (though confessed), really amounted to treason.

and others.

The trials of Babington, and the others concerned in Mary's conspiracy, were conducted in the same manner; and the convictions of such as did not plead guilty were had upon the depositions of absent persons.

The indictments against these conspirators were all laid upon stat. 25 Ed. 3. When one of the prisoners objected, that by stat. 1 & 13 El., there must be two witnesses, and those brought face to face, imagining that the indictment was upon those statutes, the Chief Justice Anderson said, that true, the overt act upon stat. 1 & 13 El. must be proved by two witnesses; but this is upon stat. 25 Edw. 3., which speaks of those who *imagine*; and *how*, says he, *can that be proved by honest men, being a secret cogitation which lieth in the minds of traitors?* (Ibid. 137.) So that treason would by these means never be revealed! Thus was the law laid down by a sage, who was at the head of it; which *dictum* passed uncontradicted. It may be observed, that these severe laws, which enacted treason, namely, 1 & 13 El., had defeated their own object, by containing the clause which required two witnesses. For the crown-lawyers always thought it most convenient, and sure, to proceed on the stat. 25 Edw. 3.; and when the above-mentioned exposition could be put upon it, surely no other help towards the con-

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viction of every one who was tried could possibly be wished for.

The proceeding against Mary Queen of Scots, as it was on a particular statute (27 El. c. 1.), is hardly to be judged of upon the same rule as the others. The prosecution was, however, supported in the same way as the former, upon written evidence. Two witnesses were indeed heard *vivâ voce*, but this was rather to patch up the prosecution, which seemed to need support; for they were not heard in the presence of the queen, nor at the trial, but at another time, when the commissioners met to give judgment. (1 Sta. Tri. 155.)

Whether this mode of proceeding had raised some clamour, and a consideration that the stat. 1 & 13 El., because they required two witnesses in treason, were declined by the government, and the statute of Edward the Third preferred, because it did not give that benefit to a prisoner, might have been the cause that no small degree of malevolence was imputed to the governing powers; or whether some doubt might begin now to be entertained that the statutes of Edward the Sixth were still in force; whatever might have been the reasons which weighed with the courts, they began to alter their conduct in this particular; for we find in 31 El. in the trial of Lord Arundel, that the queen's counsel called two witnesses to give a kind of hearsay evidence as to their knowledge of the matters opened; and then some others were called, whose testimony did not go farther. (Ibid. 168.) This indictment was upon 25 Ed. 3.

This seemed now to be a method which they had hit upon to support and give colour to the rest of the proofs which were still of the old kind. In 34 El. on the trial of Sir John Perrott, besides the reading of depositions, some witnesses were called. (Ibid. 192, 193.)

The trials of Lord Essex and Lord Southamptom exhibit a mixture of both: there are examinations of persons absent, and the depositions of persons present in court

read and attested by the deponents *vivâ voce*. (1 Sta. Tri. 200, 201.) The only witness not of that kind was Sir Walter Raleigh, who related upon oath what was *told* him, and spoke nothing from his own knowledge. Sir Ferdinando Gorges being pressed by the Lord Essex to speak to some facts at first declined it, and referred to his deposition. The famous testimony of Mr. Francis Bacon in this trial did not go to the fact of criminality. Sir Christopher Blount and his associates were likewise convicted of treason upon depositions only. (Ibid. 209.)

Of trials for treason.

All these prosecutions, as we have before observed, were upon the statute of Edward the Third; which was quite contrary to the expectations of the parties, who generally supposed they were indicted on the two statutes of the queen before alluded to, and were much disappointed when they were told they were not entitled to have their guilt proved by two witnesses as prescribed by those acts. It is true that these statutes require indictments upon them to be brought within a certain limited time, and therefore, in some cases, would not have answered the ends of justice; yet, where they might, as in Lord Essex's case, they were not put in use. The old statute of Edward the Third was preferred, for the reasons we before gave; upon this act they put what interpretation they pleased, so much so that they ventured to pronounce that no overt act need be proved on an indictment upon that act.

It was always the principal charge in these indictments that the party compassed the death of the queen, a charge of which all expressed the extremest detestation; and as the facts, even such as were proved, were quite of another kind than such as indicated an attempt against her person, when they found themselves convicted of the whole indictment, there followed a dissatisfaction and murmur as against the justice of the verdict. This was not explained till the trial of Lord Essex, in 43 El., when the two chief justices and the chief baron agreed in the following opinion: That "where a subject attempts to put himself in such force as

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the king shall not be able to resist, and to force and compel the king to govern otherwise than according to his own royal authority and direction, it is manifest rebellion." And, "that in every rebellion, the law intends, as a consequence, the compassing the death and deprivation of the king, as foreseeing that the rebel will never suffer that king to live or reign, who might punish or take revenge of his treason or rebellion." (1 Sta. Tri. 207.) And, afterwards, in the case of Sir Christopher Blount and his associates when they disavowed any design to kill the queen, the chief justice condescended to explain this to them in a like way, and it was declared to be no mystery of law. (Ibid. 209.)

However this might be law and sense, where resistance and force were used, as in the case of Lord Essex and Sir Christopher Blount, it is difficult to reconcile it with either when applied to Sir John Perrott, whose offence seems to have been only some peevish and angry speeches made in conversation respecting the queen; and, at worst, nothing more than some omissions of duty, or want of activity in his place of lord-deputy of Ireland. How this could be compassing to kill the queen or raising rebellion is very mysterious, notwithstanding all the intendments and suppositions of law.

A prosecution never missed of its aim from any defect of evidence, or of any thing else. Against the weight and ability of the crown lawyers a prisoner had nothing to oppose: he was allowed no counsel; and if he prayed the court in their humanity to see that the indictment was sufficient, they answered him, that they sat there not to give counsel, but to judge. Even the innocence of a prisoner could not be made out; for witnesses were not to be heard against the crown, as the judge told *Udal* who was tried for felony only. (Ibid. 173.) Juries were no protection to the subject: they were generally, it may be supposed, packed; for though the court might perhaps allow challenges for cause, they would not allow a prisoner to take one peremptory challenge. (Captain Lee's Trial, 7 State

Tri. 43.) Nobody was, nor does it appear how any one possibly could be acquitted. A trial for high treason seems in this reign to have been a formal, but a certain, method of destroying an obnoxious man.

and other offences.

This partial mode of proceeding was not confined to treasons, where an anxiety to preserve the sovereign and the state might be thought a sufficient cause in those days to take away the lives of such as were only suspected by any sharp or hasty way of enquiry whatever. But in prosecutions for felony, where the government had taken a part in the object of it, trials were conducted in a similar manner. *Udal* was tried for felony on stat. 23 El. c. 2., which had made it felony to make any book containing false, seditious, or slanderous matter to the defamation of the queen, or to the moving of rebellion. This man was indicted for having written a book called the *Demonstration of Discipline*, in which he attacked the bishops, which was considered as within the act. The proceeding was entirely consistent with such a setting out. There were only the depositions of two persons read; one of these, says Udal, told him he was the author. The other says, a friend of Udal's told him so. (1 Sta. Tri. 173.) The court offered to swear Udal whether he was the author or not, and refused to hear the witnesses which he offered to produce. So that, with all this prejudice against him, there could be little doubt of the conviction which followed.

Though it is probable that this extreme eagerness and pains to convict were confined only to such prosecutions as were carried on by government, yet all the criminal proceedings of this time most likely partook of the irregularity we see in these. It would not have been safe or wise to have pursued a plan entirely different from the prevailing one in ordinary trials.

The use of depositions had probably become more frequent of late, as they seemed now to be a sort of evidence which had received the sanction of law, by stat. 1 & 2 Ph. & Ma. c. 13. That statute had directed justices of the

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peace to take the examination of all persons accused, and the information of accusers, and transmit them to the gaol-delivery. Thus, in all cases of felony at least, there was in court a body of evidence taken as the law directed, and any further hearing of the parties might be thought superfluous. However, it is not to be supposed that there was no evidence given for a prosecution, but such depositions and examinations; witnesses were sworn, and delivered their testimony *ore tenus* in court; and it is most likely *in common cases* the prisoner was allowed to produce witnesses in his defence, according to the direction formerly given by Queen Mary to her judges. Yet, probably, the rules of evidence were the same as prevailed in these greater causes: they allowed of hearsay informations, and gave way too much to strong presumptions of guilt.

It appears that torture was sometimes used. *Campian*, the Jesuit, is said by Camden to have been put to the rack. (247.) This could not have been by the ecclesiastical law, as there was no high commission in being in 1580. It is not probable it could have been directed by the ordinary courts. It must have been under the immediate order of the sovereign, or the Star-Chamber.

Reporters.

Adjudged cases in this reign are reported all through it by *Anderson*, *Moore*, *Leonard*, *Owen*, and *Noy*. Some principal cases in the first part of it are in *Plowden*, and in the latter part they are in greater number in *Coke*. The former part of this reign is also reported in *Dyer*, *Dalison*, *Benloe*, and the book called *New Bendloe*. And the latter part in *Godbolt*, *Brownlow*, and *Goldesborough*; but more particularly and regularly, from the twenty-fourth year to the end, by that concise and judicious reporter Sir George *Croke*. All through this reign there are scattered cases in *Jenkins*, and here and there in *Cary*, *Saville*, *Hutton*, and *Popham*, and some in *Keilway*.

The books published in this reign increased the law-library to some size and value. Some persons, who had been in the habit of taking notes of what passed in court,

had come to a resolution of publishing them for the use of the profession. The first who did this was Mr. Edmund Plowden, who printed the first part of his adjudged cases, under the title of Commentaries, in 1571; and the second part, about seven years after. The success and applause with which this first attempt was received, encouraged the executors of Sir James Dyer, who had been chief justice of the Common Pleas, to print some of the notes which he had left behind him. This was done in 1585, under the title of *Reports;* so that this was the first book which bore that name. These were followed by Sir Edward Coke's Reports (for so he called them), which were printed in 1601 and 1602; then Keilwey's Reports in 1602. Bellewe's Reports, and the New Cases, were also printed some time in this reign; which make up all the books of this kind in print, at the death of Queen Elizabeth.

Plowden.

The manner in which *Plowden* has reported the decisions of courts, is peculiarly his own; none having set him a model, nor any having attempted to rival him. After having stated, in a clear manner, the case and matters of doubt to be resolved, he gives the arguments of the counsel on both sides at length; always following the course of reasoning precisely, with the topics and precedents quoted by each, in the exact style of a formal debate. In reporting the judgment of the court, he gives severally the opinions of the judges at length. A case discussed in this ample way, with all the argument of each side, considered, distinguished, and commented on by the experience and learning of the bench, must be so thoroughly sifted, as for it to be impossible not to discern the true points of a cause, and the ground upon which it was determined. Most of the cases in this book are upon demurrers, or special verdicts; and there are generally the pleadings annexed. Whether all arguments and opinions were delivered in court precisely in the detail in which we have them in Plowden; or whether the reporter, who says that his practice was to make himself master of the case in all its points, before

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he heard it argued, might not retouch them according to his own fancy afterwards. Whatever was the fact, it is certain that the principles and great leading rules of law are opened and explained with an acuteness rarely discovered in other books; and points are maintained and canvassed with a certain wary closeness of reasoning peculiar to this writer: so that altogether it is one of the most instructive and most entertaining books in the law.

Coke.

Sir Edward Coke is an author of very different character from the foregoing. The manner in which he reports is jejune and summary, without tracing out any form of argument. His general way is to give a state of the case, then to relate the effect of all that is said on one side, and likewise on the other; beginning always with the objections, and concluding with the resolution and judgment of the court. (Pref. 10 Rep. 12.) Sometimes he only gives the state of the case, and the resolutions of the court; and sometimes without any case stated at all, he mentions only the name of it, and then sets forth the points of law resolved by the court. This is always done with great weight of reason and clearness of expression. He abounds, beyond any writer, in old law; and excels in adducing proofs from adjudged cases, comparing them, and reconciling apparent repugnancies upon solid and true distinctions. At present, Lord Coke can only be mentioned as the author of the three first parts of his Reports, which is confining him in a very narrow compass. It was not till the next reigns that he published the other parts of his Reports and his Institutes, which make him a very voluminous, as well as a very eminent writer, upon the English law.

From the writings of Plowden and Coke the law derived new strength and lustre, and the study of it was considerably advanced. Their merits, however, are very different, though both writers are excellent in their way: the one, argumentative and diffuse, calls for a patient and steady perusal through the windings of many intricate

deductions; the other, concise and learned, demands a fixed attention to peremptory propositions and authentic conclusions of law. The latter, from the shortness of his manner, and of his matter, may be taken up at any time with profit; the former, being prolix in both, must be read through and studied with care and reflection. From the former may be attained a habit of legal reasoning, and the student may always exercise himself there with new pleasure and improvement; in the latter, he will possess an inexhaustible treasure of sound and incontrovertible law.

Plowden's Commentaries contain reports of cases from 4 Ed. 6. to 20 El. Lord Coke reports from that period to the end of the reign.

The Reports of Sir James Dyer contain the period from 4 Hen. 8. to 23 El. This Report of Adjudications is not to be compared with the two former works, being many of them short notes of cases, and none of them intended to be published, but were such as were collected out of that judge's papers by his nephew and executor. None of the cases are here so fully argued, nor the points so much treated at length, as in the two former reporters. They seem to be the concise notes of a man of business, containing an accurate state of the case, with the objections and answers as shortly as conveniently could be.

Law treatises.

Besides the reporters, several treatises and collections were printed. In 1596 was published Rastall's Entries; in 1568, Brooke's Abridgment of the Law; in 1572, the *Terms of the Law*, by Rastall; in 1577, Pulton's Abstract of the Penal Statutes; in 1579, *Theloal* furnished the profession with his Digest of Original Writs; in 1580 was printed *Kitchen* on Courts; and, in 1598, a book upon the Forest Law was published by *Manwood*.

Rastall.

Rastall's Entries is a collection made by that learned judge; none of the precedents were his own, but were taken out of four different books: from the old printed book of Entries; from two manuscript collections made by a prothonotary of the Common Pleas, and a secondary

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of the King's Bench; and from a manuscript of Sir John More, a Judge of the King's Bench, in the time of Henry the Eighth (9 Hen. 8. Dugd. Chro. Ses.), and grandfather of the author. They are digested in perspicuous order; and, by means of divisions, subdivisions, and the variety of references, the contents of the book are extremely accessible. We may judge by the sources from which this collection was made, that these precedents were those in use in the time of Henry the Sixth, and down through the reign of Henry the Eighth; and by the publication of them, there can be no doubt but they were now in use. This book contains not only declarations and pleas, but many records at length.

Brooke.

The Abridgment of Sir Robert Brooke is an improvement on the plan of Statham and Fitzherbert. The cases are here arranged with more strict regard to the title; but the order in which they are strung together is very little better, being generally guided only by the chronology. He observes one method, which contributes in some degree to draw the cases to a point; he generally begins a title with some modern determination, in the reign of Henry the Eighth, as a kind of rule to guide the reader in his progress through the heap of ancient cases which follow. He abridges, with great care, in the language of his own time, sometimes adding a short observation, or *quære*, furnished by the experience of later times. So that, upon the whole, the substance of the year-books, to which it is an excellent repertory, is conveyed in this one volume, in a style and manner more generally acceptable than the original. This has the praise of being the most correct of these works. (Foster.) However, such works, with all their use, can rarely be ultimately relied on: the opinion of a court can hardly be so abridged as to convey all the circumstances which had their weight in a determination; something will escape in the transfusion. As far as the nature of their design can go, they are of excellent use; and the full extent of their design was not tried till the very methodical work of Mr. Justice *Rolle* appeared, and the mo-

dern ones of *Bacon* and *Comyns*. An application to such a work as this to comprehend the great outline and extent of any branch, and a patient reading of the particular cases reported at length, more minutely to discern the grounds and principles upon which they were adjudged, is an union of labours which is necessary to form clear conceptions of the law.

Other treatises were published in the latter part of this reign. In 1583, *Crompton* printed in French the Office and Authority of a Justice of Peace, principally taken from Fitzherbert's works, enlarged by the same author. After this, Mr. *Lambard* revised his *Eirenarcha*, which had gone through two editions, one in 1579, the other in 1581; and making great use of Mr. Crompton's book, which had been published in the mean time, reprinted in English, in 1599, his Eirenarcha, or the Office of a Justice of Peace, a work much more full, complete, and satisfactory than any of the former. The office of these magistrates had become burdensome, owing to the increase of laws, and the multitude of concerns they were to determine on. It was very necessary that some pains should be taken to smooth the way towards the attainment of the requisite knowledge, by some well-digested treatise. The criminal law is treated by this author in a very different way from any who went before him. It has none of the concise starchness discovered in the compilations of *Staunforde* and *Fitzherbert*; but discourses more at large in the liberal stile which few writers upon the law had condescended to imitate since the time of Bracton, Fleta, and Britton. Fortescue's book, De Laudibus, and the Doctor and Student, were the only pieces (unless Littleton may be thought worthy to be excepted) of authority, upon legal subjects, which were not put together with all the closeness and dryness of mere compilations. Lambard.

Mr. Crompton printed also, in 1594, a French treatise on the Authority and Jurisdiction of Courts; a book which left sufficient room for the additions and improvements

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ELIZAB. A spirit of enquiry had spread itself, which would not be satisfied with the materials of modern knowledge; they began to look higher, and to investigate the antiquity and history of our jurisprudence. To forward this was printed, in 1569, the valuable code of our ancient law, written by Bracton; and to carry this pursuit still further, Mr. Lambard printed, in 1568, his *Archaionomia*, containing the Anglo-Saxon laws, those of William the Conqueror, and of Henry the First. Thus were the old volumes of the law once more brought into observation; however, at this distance of time, they fell rather into the hands of the inquisitive and learned, than afforded much assistance to the practiser.

Miscellaneous facts. It does not appear what time of probation was fixed before *apprentices* were permitted to practise in the courts at Westminster; nor whether it was an act of the society, of which he was a member, or of the judges, that he was allowed to practise at all. Every society had its particular orders, all differing a little; and according to them, they respectively appointed their readers, teachers, and others, and regulated all exercises required of the students.

In the 3 & 4 Ph. and Ma. there had been some orders agreed on by all the inns of court for a general regulation to be observed in each. They mostly concerned dress, and attendances at meals; among the rest, there is one that forbids the admission of attorneys. If any one *practise attorneyship*, he was to be dismissed, but to be permitted to repair to an inn of chancery. (Dugd. Or. 310.)

At the beginning of this reign, the judges had taken into consideration the government of these societies; and upon All-Soul's day, in the 1st El., they came to some resolutions, which they promulgated for the observance of all the inns of court. The like was done in 16th El., by commandment of the queen, and advice of the privy-council.

Again in the 33d, 36th, and 38th years of the queen. (Dudg. Or. 310.)

The course of study seemed at this time to require every one should commence by residing at an inn of chancery, and then proceed to some inn of court. As all the inns of chancery belonged to some one of the inns of court, they were under their government in all matters, and particularly in what concerned the education of students. The study of the place was, in a degree, ordered and promoted by *readers*, who were appointed to *read lectures* upon certain points, both in the inns of chancery and of court. These readings were very frequent both in term and vacation. Besides these, there were exercises which the students engaged in under the direction of the readers: these were called *moots*, and had various names in the different societies, according to the seasons and occasions when they were held. (*Ibid.*)

We have seen, that heretofore there were only two description of advocates: these were *sergeants* and *apprentices*. But we find in this reign (and no doubt it had been so some time), that the orders of the profession were these: — The lowest was a *student*, called also an *inner barrister*; and so distinguished from the next rank, which was that of an *outer*, or *utter barrister*; then came an *apprentice*; and next a *sergeant*.

We shall now consider the regulations which we just said were made by the judges concerning the professors of the law.

It should seem that the *students* commenced *inner barristers*, when they entered upon their exercises for the bar, which is much like the condition of a *soph* at the universities, who is performing his exercises for the bachelor's degree. None were to be admitted to the bar but such as had been at least of seven years' continuance, and had kept all their exercises, at least three years, within the house, and in the inn of chancery, according to the orders of the house. Only *four* were to be called every year. In some

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houses the benchers called; in others, it was the business of the reader to call inner barristers to the bar; and in all, the reader's report of their merit and qualifications was the supposed ground for calling.

When persons were called to the bar, they were still expected to preserve a silence; for no utter barrister was admitted to plead in any court at Westminster, nor to subscribe any bill or plea, unless he was a *reader* or *bencher*, or had been *five years* an utter barrister, and had continued all that time in exercise, or a reader in chancery, two years at least. An utter barrister was to keep his exercises, both in his house and in the inn of chancery, for three years after he was at the bar, otherwise he was not to continue an utter barrister.

It was probably at the end of these five years, or when utter barristers were by any of the other above-mentioned qualifications admitted to plead, that they arrived at the distinguished rank of *apprentices of the law.* It does not appear that they were yet called *counsellors.* A reader was not to practise but in his reader's gown, having a velvet welt on the back. Readers ranked before utter barristers, and next after apprentices. This is all that can be collected of the professors of law at this time, from the rules and orders settled for their government and regulation. (Dudg. Or. 310 — 316.)

There was a character and description in the law, which had subsisted from a very early period, but which had now grown to a high consideration: this was that of *a clerk.* It was the business of the three prothonotaries of the Common Pleas to *draw* and *enter* all declarations and pleas in causes depending there. To assist them in this business, they kept clerks, who had been brought up in the office, and were as well acquainted with the duties of it as the prothonotaries themselves; to which they in course of time succeeded. All attornies who had causes here were to employ some one of these clerks, to conduct that part of his cause which consisted in declarations, pleas, and entries. And it

had lately become not uncommon for some of these clerks to act also as attornies, and so sue out writs and manage an action from beginning to end.

The continual habit of business gave the persons conversant in this office a great dexterity in pleading and practice; and the appellation of *clerk* coming at length to signify the possession of these attainments, was assumed by the pleaders of these times with no small degree of complacency. The character of a *good prothonotary*, or a *good clerk*, was not a little addition to the praise of a lawyer.

Thus the prothonotary's office became the school for pleading; and young men used to be placed there at their entrance upon their studies, to learn this most essential part of legal knowledge. We find Sir James Dyer, when he was chief justice of the Common Pleas, in his address to the attornies and officers of that court, telling them that he had been himself sometime *a clerk in that office*. (Praxis Ut. Banc. 46.)

Many regulations were made by order of the court of Common Pleas for securing to the clerks in court their proper business, to prevent attornies from encroaching on them; to oblige attornies to make due payment of the fees to their clerks; and the clerks to account with prothonotaries. Many orders were also made to compel attornies to a regular attendance on the court, and to confine the officers to a proper discharge of their duty. (Prax. Ut. Banc. 35, 36.)

The privilege of entering was secured to the prothonotary by several orders. No continuance, says one order, nor discontinuance, no alteration or amendment, shall be made in any roll of the court, nor in any writing going out of the office of this court, by any attorney, upon pain of imprisonment. (Prax. Ut. Banc. 36.)

Attornies were now grown to a considerable body of men; and, therefore, to prevent persons acting in that capacity who were not known to the court, and so not easily amenable to censure, it was ordered by the court of Common Pleas, in 15 El. that no attorney of the court shall

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give, let to rent, or lend his name to any person, nor suffer any person to use his name, under the penalty of forfeiting for the first offence 20*s*., and for the second offence, of being expelled from the court. (Prax. Ut. Banc. 37.) For reformation of the excessive and unnecessary number of attornies, it was ordered, that an attorney absenting himself two terms, unless for good cause, to be allowed by the court, shall be no longer an attorney. (Ibid. 66.) And to lessen the causes of absence, it was ordered that every attorney of the Common Pleas shall satisfy himself with suits in that court; and shall not prosecute or follow for the plaintiffs, or plead to any action, bill, or suit, upon any process in any other court than in that, upon pain of forfeiting for the first offence 40*s*., and for the second of being expelled. (Ibid. 38. 55.) Attornies who did not pay for their entries before the end of the subsequent term, were to be put out of the roll.

In the 9 El. there was a formal and general enquiry made into the abuses of his court by Sir James Dyer, then chief justice of the Common Pleas. A writ issued *custodi palatii nostri*, Westminster, in the king's name, to summon a jury, as well of officers as of attornies of that court, to enquire of falsifications, rasures, contempts, misprisions, and other offences there committed. Upon the execution of this enquiry the chief justice made a solemn charge, which is still in being. (Ibid. 42.)

These were regulations made in the court of Common Pleas in this reign. There are no *Orders* of the King's Bench extant.

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